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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 735.

H. C. JONES, H. C. JONES, EXECUTOR; JAMES DOLLIVER
BROWN, ET AL., PLAINTIFFS IN ERROR,

vs.

BUFFALO CREEK COAL & COKE COMPANY.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF WEST VIRGINIA.

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TRANSCRIPT OF THE RECORD

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA,
AT CHARLESTON.

BUFFALO COAL & COKE COMPANY, a Corporation,
vs.) No. 630. In Ejectment.

H. C. JONES AND OTHERS.

Campbell, Brown & Davis, and Lilly & Shrewsbury for plaintiff and defendant in error; Maynard F. Stiles, Esquire, and I. P. Baer, Esquire for defendants and plaintiffs in error.

Be it remembered that heretofore, to-wit: At a District Court of the United States for the Southern District of West Virginia continued and held at Huntington, in said District on Tuesday, the 10th day of November, 1914, the following order was made and entered of record:

ORDER TRANSFERRING CAUSE FROM EQUITY TO LAW.

Buffalo Creek Coal & Coke Company, a Corporation, Complainant,

vs.) (No. 308. In Equity.)

H. C. Jones; H. C. Jones, Executor of the Last Will and Testament of Hannah C. Jones, deceased; James Doliver Brown, I. P. Baer, Trustee, I. P. Baer, Edwin L. Hall and Barbara V. Hall, his wife; Edwin L. Hall, Trustee, John W. Hall and Cora S. Hall, his wife; William Haddington and Nancy C. Haddington, his wife; Eliza H. Kleckner, Francis H. Walter, William P. Hall and Anna Hall his wife; Frank Hall and Gladys T. Hall, his wife; C. F. Thomas, Peytonia Lumber Company, a corporation, and Avon Coal Company, a corporation, Defendants.

This day this cause came on to be heard and it appearing to the Court that this suit, commenced in equity, should have been brought as an action on the law side of this court, it is

Ordered that the same be, and is hereby, transferred to the law side of this court and directed there to be proceeded with; the plaintiff being required to alter its pleadings by filing its regular declaration in ejectment, which declaration the plaintiff here files in open court.

And, thereupon, the defendants severally appeared to said declaration and for plea say that they are not guilty of unlawfully withholding the possession of the premises, as set forth in the declaration herein, and of this they put themselves upon the country, and the plaintiff doth the like.

The right is hereby reserved to the several defendants to file any disclaimer they may be advised is deemed necessary, on or before the trial of this cause.

The Declaration in Ejectment referred to in the foregoing order is in the words and figures as follows:

DECLARATION IN EJECTMENT.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA,
AT HUNTINGTON.

Buffalo Creek Coal & Coke Company, a corporation, Plaintiff,

vs.) In Ejectment.

H. C. Jones et als., Defendants.

Buffalo Creek Coal & Coke Company, a corporation, created by, organized and existing under the laws of the State of Georgia, and as such a citizen and resident of the State of Georgia, complains of H. C. Jones; H. C. Jones, Executor of the Last Will and Testament of Hannah C.

Jones, deceased; James Doliver Brown; I. P. Baer, Trustee; and I. P. Baer, who are each citizens and residents of the State of West Virginia, and of the Southern District thereof; Edwin L. Hall and Barbara V. Hall, his wife; Edwin L. Hall, Trustee; John W. Hall and Cora S. Hall, his wife; William Haddington and Nancy C. Haddington, his wife; Eliza H. Kleckner, Francis H. Walter, William P. Hall and Anna Hall, his wife; Frank Hall and Gladys T. Hall, his wife, who are each citizens and residents of the State of Maryland; C. F. Thomas, who is a citizen of the State of Delaware; Pevtonia Lumber Company, a corporation, created, organized and existing under the laws of the State of West Virginia, and a resident and citizen of the Southern district thereof; Avon Coal Company, a corporation, created, organized and existing under the laws of the State of Ohio, a citizen and resident of said State of Ohio, a citizen and resident of said State of Ohio, of a plea of trespass on the case, for that, heretofore, to-wit, on the first day of December, 1913, the said Buffalo Creek Coal & Coke Company, a corporation, was seized and possessed, in fee simple, of a certain tract of land, situate on Guyandotte River, Buffalo and Huffs creek, in Logan county, West Virginia, and more particularly bounded and described, as follows:

Beginning at a beech and white oak on the bank of Huffs Creek, about 1000 feet east of Dry Branch and about two miles east of the mouth of Huffs Creek; thence N 64° 19' W. 302.3 feet to a cucumber on the left bank of Huffs Creek, corner to Joseph MacDonald's 250 acre tract; N. 25° 23' E. 670.80 feet to a beech and white walnut, a corner to William Ward's 500 acre patent and the Buskirk Tract, and with the latter N. 45° 07' W. 1619.50 feet to a stake about 300 feet from the fork of Muddy Rock House Branch, in the edge of a field; N. 15° 01' E. 2173.00 feet to a large chestnut oak, a corner to Buskirk; thence S. 79° 58' W. 4812.27 feet to a lynn and hickory; S. 59° 03' W. 2459.6 feet to a beech on the north side of Riddle Branch, near the mouth of a small hollow; N. 10° 00' E. 693 feet to a beech and lynn; S. 61° 17' W. 1667.1 feet to a stake, small ash and dogwood pointers; S. 13° 16' W. 873.66 feet to a hickory and fallen black oak on a point; S. 12° 40' W. 1065-27/100 feet to a stake on left bank of Big Huffs Creek; N. 36° 19' W. 932.88

feet to a stake with two hickory pointers; N. 65° 32' W. 163.84 feet to a hickory, water oak, sarvice and maple; N. 72° 57' W. 297.77 feet to a chestnut oak, water oak, and two lynns; N. 65° 50' W. 404.15 feet to three chestnut oaks; N. 3° 35' W. 1967.09 feet to four chestnuts; N. 61° 14' E. 2497.48 feet to a stake with two black oak pointers; N. 17° 57' E. 1584.94 feet to a cross mark on a large rock on top of ridge between Buffalo Creek and Big Huffs Creek on a line of Bruce McDonald's 135.28 acre tract; S. 65° 40' E. 504.7 feet to a black oak on a knob at the head of Pounding Mill Branch; N. 63° 37' E. 845.7 feet to a hickory on a small knob between Riddle Branch and Bull Hollow; S. 68° 56' E. 645.6 feet to a chestnut oak on a ridge; S. 87° 28' E. 842.7 feet to two lynns and a hickory by a cliff on the side of divide between Riddle Branch and Bull Hollow; N. 54° 27' E. 561.6 feet to a water oak and chestnut oak on a steep hillside; N. 16° 40' E. 770.8 feet to a double lynn; thence crossing Bull Hollow near the head of same; N. 62° 35' W. 1054 feet to a white oak on side of a point; N. 11° 54' W. 295.7 feet to an ash by a large rock in a drain; N. 80° 25' W. 523.9 feet to a hickory and black oak on a hillside; N. 52° 23' W. 794.2 feet to a large chestnut oak on a hillside about 140 feet below drain; S. 85° 10' W. 901 feet to a beech and forked lynn near a cliff on left bank of Big Bull Branch; S. 19° 21' W. 721.9 feet to a spruce, pine, hickory and chestnut oak on a point; S. 61° 36' E. 220 feet to a large chestnut oak on hillside; S. 20° 31' W. 858.3 feet to two small sourwoods on the side of a point; S. 4° 17' E. 644 feet to a large chestnut oak near the top of a ridge between Buffalo Creek and Big Huff Creeks; N. 72° 42' W. 1557.39 feet to a cross mark on a rock on small knob; S. 51° 20' W. 681.15 feet to a *chrstnut* on a knob; S. 77° 06' W. 622.9 feet to two small black pines; N. 50° 16' W. 1371.85 feet to a black pine and chestnut; S. 69° 14' W. 447.56 feet to a small chestnut and fallen *cheectnut* oak; S. 52° 54' W. 2069.54 feet to a Spanish oak and small hickory; N. 74° 44' W. 243.62 feet to three small ironwoods; S. 61° 20' W. 2199 feet to a water oak; S. 46° 48' W. 333.41 feet to two water oaks; S. 41° 08' E. 506.77 feet to a chestnut oak and red oak; S. 73° 11' E. 442.53 feet to a small birch and beech; S. 77° 45' W. 3272.31 feet to a stake on the left bank of Guyandotte River, 100 poles

from the center of Buffalo Creek Valley; thence in a direction up Buffalo Creek, keeping 100 poles from the center of the valley of said creek; N. 50° 56' E. 1420.16 feet to a stake; N. 57° 10' E. 1910.89 feet to a stake; N. 25° 23' E. 2129.11 feet to a stake; N. 64° 03' E. 1701.14 feet to a stake; N. 37° 18' E. 929.87 feet to a stake; S. 76° 48' E. 1722.33 feet to a stake; N. 63° 43' E. 2771.6 feet to a stake in Bull Hollow; N. 48° 52' E. 1501.14 feet to a stake; thence N. 12° 25' E. 1955.57 feet to a stake corner to what was formerly the Lilly & Shrewsbury tract, now belonging to the Hector Coal Land Company; thence with the line of said Lilly & Shrewsbury tract, and crossing said Buffalo Valley; N. 67° 45' W. 3342 feet to a stake on the hill, 100 poles from the center of Buffalo Creek Valley; thence with said 100 pole line; N. 12° 24' E. 540 feet to a stake; N 47° 05' E. 1205 feet to a stake; thence with a line of said Lilly & Shrewsbury tract crossing said Buffalo Creek Valley; S. 47° 58' E. 3300 feet to a stake on the hill in the 100 pole line corner to what was formerly the L. A. and Mary Browning tract, now owned by the Hector Coal Land Company; N. 47° 05' E. 1250.1 feet to a stake in said 100 pole line; thence leaving said 100 pole line and up the right-hand fork of said Buffalo Creek; S. 48° 10' E. 1172.7 feet to a stake; S. 34° 44' E. 507.8 feet to a stake; S. 57° 44' E. 492.6 feet to a stake; S. 72° 27' E. 680.15 feet to a stake by a buckeye and wahoo pointers, corner to the said Browning tract and tract belonging to T. N. Perry, and on the west bank of the Right-Hand Fork of the said Buffalo Creek; thence with a line of said T. N. Perry; S. 39° 49' E. 496 feet to a birch and beech stump on a cliff of rocks 20 feet south of said Right-Hand Fork; S. 55° 00' E. 561 feet to a stake and stone pile on the south bank of said Right-Hand Fork at the foot of a rock ledge; S. 30° 29' E. 1222.3 feet to a spruce pine stump at the foot of the mountain and 60 feet from said Right-Hand Fork; S. 36° 16' E. 1202 feet to a mountain birch and water birch at the foot of a hill; S. 56° 50' E. 1258 feet to a large mountain birch near the foot of the hill; S. 77° 30' E. 1683 feet to a stake on the hillside about 200 feet from the creek; N. 82° 24' E. 341.0 feet to a stake; thence crossing the divide between Right Hand Fork of Buffalo Creek and Huff Creek; S. 3° 29' E. 6368.13 feet to a stake; S. 64° 03' W.

2200.00 feet to a beech and white oak on the bank of Huff Creek, about 1000 feet east of Dry Branch and about two miles east of the mouth of Huff Creek, the beginning corner, containing twenty-one hundred and sixty-five and ninety-two one-hundredths (2165.92) acres of land, and being so possessed thereof, the said defendants, to-wit, on the second day of December, 1913, entered into the said premises and unlawfully withhold from the plaintiff the possession thereof, to the damage of said plaintiff, \$5000.00.

The plaintiff says that this is an action of a civil nature and that the value of the matter in dispute herein exceeds the sum of \$3000.00, exclusive of interest and costs.

Therefore, plaintiff brings its suit.

BUFFALO CREEK COAL & COKE COMPANY,
a corporation,

By W. R. LILLY,
Counsel.

LILLY & SHREWSBURY,
CAMPBELL, BROWN & DAVIS,
Attorneys.

(Endorsed.)

Filed November 10, 1914.

EDWIN M. KEATLEY, Clerk.

And at another day, to-wit: At a District Court of the United States for the Southern District of West Virginia, continued and held at Huntington, in said District, on Saturday the 14th day of October, 1914, the following order was made and entered of record:

ORDER TRANSFERRING CAUSE TO CHARLESTON.

Buffalo Creek Coal & Coke Company, a corporation,
vs.) No. 308. In Ejectment.

H. C. Jones et al.

This day came the parties by their respective attorneys, and by agreement, it is ordered that this cause be remitted to the District Court of the United States for the Southern District of West Virginia, sitting at Charleston, and that the same be set down for trial on Monday the 30th day of November, 1914.

And at another day, to-wit: At a District Court of the United States for the Southern District of West Virginia, continued and held at Charleston in said District, on Monday the 30th day of November, 1914, the following order was made and entered of record:

ORDER DISMISSING CAUSE AS TO PAYTONIA
LUMBER COMPANY AND AVON COAL
COMPANY.

Buffalo Creek Coal & Coke Company, a corporation, Plaintiff,

vs.) No. 630.) In Ejectment.

H. C. Jones, et als., Defendants.

Now comes the plaintiff and defendants by their attorneys and thereupon the plaintiff moves the Court to dismiss from this suit the Peytona Lumber Company, a corporation, and the Avon Coal Company, a corporation, upon consideration of which the Court grants said motion, and it is ordered that this suit be and the same is hereby dismissed, without prejudice, as to the defendants, the Peytona Lumber Company, a corporation, and the Avon Coal Company, a corporation.

And upon the same day, to-wit. At a District Court of the United States for the Southern District of West Virginia continued and held at Charleston in said District, on Monday the 30th day of November, 1914, the following order was made and entered of record:

ORDER FILING AMENDED DECLARATION AND
MAKING UP ISSUE.

Buffalo Creek Coal & Coke Company, a corporation, Plaintiff,

vs.) No. 630.) In Ejectment.

H. C. Jones, et als., Defendants.

Now comes the plaintiff the Buffalo Creek Coal & Coke Company, a corporation, by its counsel, as well as the Avon Coal Company, a corporation, by its counsel, and moves the Court to file an Amended Declaration herein, in which Amended Declaration in the Second Count thereof, the

said Avon Coal Company joins as plaintiff with the Buffalo Creek Coal & Coke Company, which leave is granted and said Amended Declaration is filed in open Court. Thereupon the defendants severally appeared to said Declaration, Amended as aforesaid, and for plea say that they are not guilty of unlawfully withholding the possession of the premises as set forth in the Amended Declaration herein and each count thereof, and of this they put themselves upon the country, and the plaintiffs do the like and thereupon issue is joined.

The amended declaration in ejectment referred to in the foregoing order is in the words and figures as follows:

AMENDED DECLARATION IN EJECTMENT.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA,
AT HUNTINGTON.

Buffalo Creek Coal & Coke Company, a corporation, Com-
plainant,

vs.) *In Ejectment.*

H. C. Jones, et als., Defendants.

AMENDED DECLARATION.

First Count.

Buffalo Creek Coal & Coke Company, a corporation, created by, organized and existing under the laws of the State of Georgia, and as such a citizen and resident of the State of Georgia, complains of H. C. Jones; H. C. Jones, Executor of the Last Will and Testament of Hannah C. Jones, deceased; James Doliver Brown; I. P. Baer, Trustee, and I. P. Baer, who are each citizens and residents of the State of West Virginia, and of the Southern District thereof; Edwin L. Hall and Barbara V. Hall, his wife; Edwin L. Hall, Trustee; John W. Hall and Cora S. Hall, his wife; William Haddington and Naney C. Haddington, his wife; Eliza H. Kleckner, Francis H. Walter, William P. Hall and An-

na Hall, his wife; Frank Hall and Gladys T. Hall, his wife, who are each citizens and residents of the State of Maryland; C. F. Thomas, who is a citizen of the State of Delaware, of a plea of trespass on the case, for that, heretofore, to-wit, on the first day of December, 1913, the said Buffalo Creek Coal & Coke Company, a corporation, was seized and possessed, in fee *simply*, of a certain tract of land, situate on Guvandotte River, Buffalo and Huffs Creeks, in Logan county, West Virginia, and more particularly bounded and described as follows:

Beginning at a beech and white oak on the bank of Huffs Creek, about 1000 feet east of Dry Branch and about two miles east of the mouth of Huffs Creek; thence N. $64^{\circ} 19'$ W. 302.3 feet to a cucumber on the left bank of Huffs Creek, corner to Joseph McDonald's 250 acre tract; N. $25^{\circ} 23'$ E. 670.80 feet to a beech and white walnut, a corner to William Ward's 500 acre patent and the Buskirk Tract, and with the latter N. $45^{\circ} 07'$ W. 1619.50 feet to a stake about 300 feet from the fork of Muddy Rock House Branch, in the edge of a field; N. $15^{\circ} 01'$ E. 2175.00 feet to a large *chestnut* oak, a corner to Buskirk; thence S. $79^{\circ} 58'$ W. 4812.27 feet to a lynn and hickory; S. $59^{\circ} 03'$ W. 2459.6 feet to a beech on the north side of Riddle Branch, near the mouth of a small hollow; N. $10^{\circ} 00'$ E. 693 feet to a beech and lynn; S. $61^{\circ} 17'$ W. 1667.1 feet to a stake, small ash and dogwood pointers; S. $13^{\circ} 16'$ W. 873.66 feet to a hickory and fallen black oak on a point; S. $12^{\circ} 40'$ W. 1065-29/100 feet to a stake on left bank of Big Huffs Creek; N. $36^{\circ} 19'$ W. 932.88 feet to a stake with two hickory pointers; N. $65^{\circ} 32'$ W. 163.84 feet to a hickory, water oak, sarvice and maple; N. $72^{\circ} 57'$ W. 297.77 feet to a *chestnut* oak, water oak, and two lynns; N. $65^{\circ} 50'$ W. 404.15 feet to three *chestnut* oaks; N. $3^{\circ} 35'$ W. 1967.09 feet to four *chestnuts*; N. $61^{\circ} 14'$ E. 2497.48 feet to a stake with two black oak pointers; N. $17^{\circ} 57'$ E. 1584.94 feet to a cross mark on a large rock on top of ridge between Buffalo Creek and Big Huffs Creek on a line of Bruce McDonald's 135.28 acre tract; S. $65^{\circ} 40'$ E. 504.7 feet to a black oak on a knob at the head of Pounding Mill Branch; N. $63^{\circ} 37'$ E. 845.7 feet to a hickory on a small knob between Riddle Branch and Bull Hollow; S. $68^{\circ} 56'$ E. 645.6 feet to a *chestnut* oak on a ridge; S. $87^{\circ} 28'$ E. 842.7 feet to two lynns and a hickory

by a cliff on the side of divide between Riddle Branch and Bull Hollow; N. $54^{\circ} 27'$ E. 561.6 feet to a water oak and *chesnut* oak on a steep hillside; N. $16^{\circ} 40'$ E. 770.8 feet to a double lynn; thence crossing Bull Hollow near the head of same; N. $62^{\circ} 35'$ W. 1054 feet to a white oak on side of a point; N. $11^{\circ} 54'$ W. 295.7 feet to an ash by a large rock in a drain; N. $80^{\circ} 25'$ W. 525.9 feet a hickory and black oak on a hillside; N. $52^{\circ} 23'$ W. 794.2 feet to a large *chesnut* oak on a hillside about 140 feet below drain; S. $85^{\circ} 10'$ W. 901 feet to a beech and forked lynn near a cliff on left bank of Big Bull Branch; S. $19^{\circ} 21'$ W. 721.9 feet to a spruce, pine, hickory and *chesnut* oak on a point; S. $61^{\circ} 36'$ E. 220 feet to a large *chesnut* oak on hillside; S. $20^{\circ} 31'$ W. 858.3 feet to two small sourwoods on the side of a point; S. $4^{\circ} 17'$ E. 644 feet to a large *chesnut* oak near the top of a ridge between Buffalo Creek and Big Huff Creeks; N. $72^{\circ} 42'$ W. 1557.39 feet to a cross mark on a rock on small knob; S. $51^{\circ} 20'$ W. 681.15 feet to a *chesnut* on a knob; S. $77^{\circ} 06'$ W. 622.9 feet to two small black pines; N. $50^{\circ} 16'$ W. 1371.85 feet to a black pine and *chesnut*; S. $69^{\circ} 14'$ W. 447.56 feet to a small *chesnut* and fallen *chesnut* oak; S. $52^{\circ} 54'$ W. 2069.54 feet to a *Spanisk* oak and small hickory; N. $74^{\circ} 44'$ W. 243.62 feet to three small ironwoods; S. $61^{\circ} 20'$ W. 2199 feet to a water oak; S. $46^{\circ} 48'$ W. 333.41 feet to two water oaks; S. $41^{\circ} 08'$ E. 506.77 feet to a *chesnut* oak and red oak; S. $73^{\circ} 11'$ E. 442.53 feet to a small birch and beech; S. $77^{\circ} 45'$ W. 3272.31 feet to a stake on the left bank of Guyandotte River, 100 poles from the center of Buffalo Creek Valley; thence in a direction up Buffalo Creek, keeping 100 poles from the center of the valley of said creek; N. $50^{\circ} 56'$ E. 1420.16 feet to a stake; N. $57^{\circ} 10'$ E. 1910.89 feet to a stake; N. $25^{\circ} 23'$ E. 2129.11 feet to a stake; N. $64^{\circ} 05'$ E. 1701.14 feet to a stake; N. $37^{\circ} 18'$ E. 929.87 feet to a stake; S. $76^{\circ} 48'$ E. 1722.33 feet to a stake; N. $63^{\circ} 43'$ E. 2771.6 feet to a stake in Bull Hollow; N. $48^{\circ} 52'$ E. 1501.14 feet to a stake; thence N. $12^{\circ} 25'$ E. 1955.57 feet to a stake corner to what was formerly the Lilly & Shrewsbury tract, now belonging to the Hector Coal Land Company; thence with the line of the said Lilly & Shrewsbury tract, and crossing said Buffalo Valley; N. $67^{\circ} 45'$ W. 3342 feet to a stake on the hill, 100 poles from the center of Buffalo Creek Valley; thence with said 100 pole line; N.

12° 24' E. 540 feet to a stake; N. 47° 05' E. 1205 feet to a stake; thence with a line of said Lilly & Shrewsbury tract crossing said Buffalo Creek Valley; S. 47° 58' E. 3300 feet to a stake on the hill in the 100 pole line corner to what was formerly the L. A. and Mary Browning tract, now owned by the Hector Coal Land Company; N. 47° 05' E. 1250.1 feet to a stake in said 100 pole line; thence leaving said 100 pole line and up the right-hand fork of said Buffalo Creek; S. 49° 10' E. 1172.7 feet to a stake; S. 34° 44' E. 507.8 feet to a stake; S. 57° 44' E. 492.6 feet to a stake; S. 72° 27' E. 680.15 feet to a stake by a buckeye and wahoo pointers, corner to the said Browning tract and tract belonging to T. N. Perry, and on the west bank of the right-hand fork of the said Buffalo Creek; thence with a line of said T. N. Perry; S. 39° 49' E. 496 feet to a birch and beech stump on a cliff of rocks 20 feet south of said right-hand fork; S. 55° 00' E. 561 feet to a stake and stone pile on the south bank of said right-hand fork at the foot of a rock ledge; S. 30° 29' E. 1222.3 feet to a spruce pine stump at the foot of the mountain and 60 feet from said right-hand fork; S. 36° 16' E. 1202 feet to a mountain birch and water birch at the foot of a hill; S. 56° 50' E. 1258 feet to a large mountain birch near the foot of the hill; S. 77° 30' E. 1683 feet to a stake on the hillside about 200 feet from the creek; N. 82° 24' E. 341.0 feet to a stake; thence crossing the divide between Right Hand Fork; of Buffalo Creek and Huff Creek; S. 3° 29' E. 6358.13 feet to a stake; S. 64° 03' W. 2200.00 feet to a beech and white oak on the bank of Huff Creek, about 1000 feet east of Dry Branch and about two miles east of the mouth of Huff Creek, the beginning corner, containing twenty-one hundred and sixty-five and ninety-two one-hundredths (2165.92) acres of land, and being so possessed thereof, the said defendants, to-wit, on the second day of December, 1913, entered into the said premises and unlawfully withhold from the plaintiff the possession thereof, to the damage of said plaintiff, \$5000.00.

Second Count.

Buffalo Creek Coal & Coke Company, a corporation, created by, organized and existing under the laws of the

State of Georgia, and as such a citizen and resident of the State of Georgia, and Avon Coal Company, a *corporated*, created by, organized and existing under the laws of the State of Ohio, and as such a citizen and resident of the State of Ohio, complains of H. C. Jones; H. C. Jones, Executor, of the Last Will and Testament of Hannah C. Jones, deceased; James Doliver Brown; I. P. Baer, Trustee; and I. P. Baer, who are each citizens and residents of the State of West Virginia, and of the Southern District thereof; Edwin L. Hall and Barbara V. Hall, his wife; Edwin L. Hall, Trustee; John W. Hall and Cora S. Hall, his wife; William Haddington and Nancy C. Haddington, his wife; Eliza H. Kleckner, Francis H. Walter, William P. Hall and Anna Hall, his wife; Frank Hall and Gladys T. Hall, his wife, who are each citizens and residents of the State of Maryland; C. F. Thomas, who is a citizen of the State of Delaware, of a plea trespass on the case, for that, heretofore, to-wit, on the first day of December, 1913, the said Buffalo Creek Coal & Coke Company, a corporation, and Avon Coal Company, a corporation, were seized and possessed, in fee simple, of a certain tract of land, situate on Guyandotte River, Buffalo and Huff Creeks in Logan County, West Virginia, and more particularly bounded and described as follows:

Beginning at a beech and white oak on the bank of Huffs Creek, about 1000 feet east of Dry Branch and about two miles east of the mouth of Huffs Creek; thence N. $64^{\circ} 19'$ W. 302.3 feet to a cucumber on the left bank of Huff's Creek, corner to Joseph McDonald's 250 acre tract; N. $25^{\circ} 23'$ E. 670.80 feet to a beech and white walnut, a corner to William Ward's 500 acre patent and the Buskirk Tract, and with the latter N. $45^{\circ} 07'$ E. 1619.50 feet to a stake about 300 feet from the fork of Muddy Rock House Branch, in the edge of a field; N. $15^{\circ} 01'$ E. 2175.00 feet to a large *chestnut* oak, a corner to Buskirk; thence S. $79^{\circ} 58'$ W. 4812.27 feet to a lynn and hickory; S. $59^{\circ} 03'$ W. 2459.6 feet to a beech on the north side of Riddle Branch, near the mouth of a small hollow; N. $10^{\circ} 00'$ E. 693 feet to a beech and lynn; S. $61^{\circ} 18'$ W. 1667.1 feet to a stake, small ash and dogwood pointers; S. $13^{\circ} 17'$ W. 873.66 feet to a hickory and fallen black oak on a point; S. $12^{\circ} 40'$ W. 1065.29/100 feet to a stake on left bank of Big Huffs Creek;

N. 36° 19' W. 932.88 feet to a stake with two hickory pointers; N. 65° 32' W. 163.84 feet to a hickory, water oak, service and maple; N. 72° 57' W. 297.77 feet to a *chesnut* oak, *whater* oak, and two lynns; N. 65° 50' W. 404.15 feet to three *chesnut* oaks; N. 3° 35' W. 1967.09 feet to four *chesnuts*; N. 61° 14' E. 2497.48 feet to a stake with two black oak pointers; N. 17° 57' E. 1584.94 feet to a cross mark on a large rock on top of ridge between Buffalo Creek and Big Huffs Creek on a line of Bruce McDonald's 135.28 acre tract; S. 65° 40' E. 504.7 feet to a black oak on a knob at the head of Pounding Mill Branch; N. 63° 37' E. 845.7 feet to hickory on a small knob between Riddle Branch and Bull Hollow; S. 68° 56' E. 645.6 feet to a *chesnut* oak on a ridge; S. 87° 28' E. 842.7 feet to two lynns and a hickory by a cliff on the side of divide between Riddle Branch and Bull Hollow; N. 54° 27' E. 561.6 feet to a water oak and *chesnut* oak on a steep hillside; N. 16° 40' E. 770.8 feet to a double lynn; thence crossing Bull Hollow near the head of same; N 62° 35' 1054 feet to a white oak on side of a point; N. 11° 54' W. 295.7 feet to an ash by a large rock in a drain; N. 80° 25' W. 525.9 feet to a hickory and black oak on a hillside; N. 52° 23' W. 794.2 feet to a large *chesnut* oak on a hillside about 140 feet below drain; S. 58° 10' W. 901 feet to a beech and forked lynn near a cliff on left bank of Big Bull Branch; S. 19° 21' W. 721.9 feet to a spruce, pine, hickory and *chesnut* oak on a point; S. 61° 36' E. 220 feet to a large *chesnut* oak on hillside; S. 21° 31' W. 858.3 feet to two small sourwoods on the side of a point; S. 4° 17' E. 644 feet to a large *chesnut* oak near the top of a ridge between Buffalo Creek and Big Huff Creeks; N. 72° 42' W. 1557.39 feet to a cross mark on a rock on small knob; S. 51° 20' W. 681.15 feet to a *chesnut* on a knob; S. 77° 06' W. 622.9 feet to two small black pines; N. 50° 16' W. 1371.85 feet to a black pine and *chesnut*; S. 69° 14' W. 447.56 feet to a small *chesnut* and fallen *chesnut* oak; S. 52° 54' W. 2069.54 feet to a Spanish oak and small hickory; N. 74° 44' W. 243.62 feet to three small ironwoods; S. 61° 20' W. 2199 feet to a water oak; S. 46° 48' W. 333.41 feet to two water oaks; S. 41° 08' E. 506.77 feet to a *chesnut* oak and red oak; S. 73° 11' E. 442.53 feet to a small birch and beech; S. 77° 45' W. 3272.31 feet to a stake on the left bank of Guyandotte River, 100 poles from the center of

Buffalo Creek Valley; thence in a direction up Buffalo Creek, keeping 100 poles from the center of the valley of said creek; N. $50^{\circ} 56'$ E. 1420.16 feet to a stake; N. $57^{\circ} 10'$ E. 1910.89 feet to a stake; N. $25^{\circ} 23'$ E. 2129.11 feet to a stake; N. $64^{\circ} 05'$ E. 1701.14 feet to a stake; N. $37^{\circ} 18'$ E. 929.87 feet to a stake; S. $76^{\circ} 48'$ E. 1722.33 feet to a stake; N. $63^{\circ} 43'$ E. 2771.6 feet to a stake in Bull Hollow; N. $48^{\circ} 52'$ 1501.14 feet to a stake; thence N. $12^{\circ} 25'$ E. 1955.57 feet to a stake corner to what was formerly the Lilly & Shrewsbury tract, now belonging to the Hector Coal Land Company; thence with the line of said Lilly & Shrewsbury tract, and crossing said Buffalo Valley; N. $67^{\circ} 45'$ W. 3342 feet to a stake on the hill, 100 poles from the center of Buffalo Creek Valley; thence the said 100 pole line; N. $12^{\circ} 24'$ E. 540 feet to a stake; N. $47^{\circ} 05'$ E. 1205 feet to a stake; thence with a line of said Lilly & Shrewsbury tract crossing said Buffalo Creek Valley; S. $47^{\circ} 58'$ E. 3300 feet to a stake on the hill in the 100 pole line corner to what was formerly the L. A. and Mary Browning tract, now owned by the Hector Coal Land Company; N. $47^{\circ} 05'$ E. 1250.1 feet to a stake in said 100 pole line; thence leaving said 100 pole line and up the right-hand fork of said Buffalo Creek; S. $48^{\circ} 10'$ E. 1172.7 feet to a stake; S. $34^{\circ} 44'$ E. 507.8 feet to a stake; S. $57^{\circ} 44'$ E. 492.6 feet to a stake; S. $72^{\circ} 27'$ E. 680.15 feet to a stake by a buckeye and wahoo pointers corner to the said Browning tract and tract belonging to T. N. Perry, and on the west bank of the Right-Hand Fork of the said Buffalo Creek; thence with a line of said T. N. Perry; S. $39^{\circ} 49'$ E. 496 feet to a birch and beech stump on a cliff of rocks 20 feet south of said Right-Hand Fork; S. $55^{\circ} 00'$ E. 561 feet to a stake and stone pile on the south bank of said Right-Hand Fork at the foot of a rock ledge; S. $30^{\circ} 29'$ E. 1222.3 feet to a spruce pine stump at the foot of the mountain and 60 feet from said Right-Hand Fork; S. $36^{\circ} 16'$ E. 1202 feet to a mountain birch and water birch at the foot of a hill; S. $56^{\circ} 50'$ E. 1258 feet to a large mountain birch near the foot of the hill; S. $77^{\circ} 30'$ E. 1683 feet to a stake on the hillside about 200 feet from the creek; N. $82^{\circ} 24'$ E. 341.0 feet to a stake; thence crossing the divide between Right Hand Fork of Buffalo Creek and Huffs Creek; S. $3^{\circ} 29'$ E. 6368.13 feet to a stake; S. $64^{\circ} 03'$ W. 2200.00 feet to a beech and white oak on the bank of Huff Creek, about 1000 feet east of Dry

Branch and about two miles east of the mouth of Huff Creek, the beginning corner, containing twenty-one hundred and sixty-five and ninety-two one-hundredths (2165.92) acres of land, and being so possessed thereof, the said defendants, to-wit, on the second day of December, 1913, entered into the said premises and unlawfully withheld from the plaintiffs the possession thereof, to the damage of said plaintiffs, \$5000.00.

The plaintiffs say that this is an action of a civil nature and that the value of the matter in dispute in each count in exceeds the sum of \$3000.00, exclusive of interest and costs.

Therefore, plaintiffs *brings* their *suite*.

BUFFALO CREEK COAL & COKE COMPANY,
a corporation,

By W. R. LILLY,
Of Counsel.

AVON COAL COMPANY,
a corporation,

By W. R. LILLY,
Of Counsel.

LILLY & SHREWSBURY,
CAMPBELL, BROWN & DAVIS,

Attys. for Plaintiffs.

(Endorsed)

Filed in open Court.
November 30, 1914.

EDWIN M. KEATLEY, *Clerk.*

And upon the same day, to-wit: at a District Court of the United States for the Southern District of West Virginia continued and held at Charleston, in said District on Monday, the 30th day of November, 1914, the following order was made and entered of record.

ORDER AMENDING PLEA AND PUTTING CAUSE
ON TRIAL.

Buffalo Creek Coal & Coke Company, a corporation,
v.) In Ejectment. No. 630.

Brown, I. P. Baer, Trustee, I. P. Baer, Edwin L. Hall
H. C. Jones, H. C. Jones, Executor of the last will and testa-
ment of Hannah C. Jones, deceased, James Doliver

and Barbara V. Hall, his wife, Edwin L. Hall, Trustee, John W. Hall and Cora S. Hall, his wife, William Haddington and Nancy C. Haddington, his wife, Eliza H. Kleckner, Francis H. Walter, William P. Hall and Anna Hall, his wife, Frank Hall and Gladys T. Hall, his wife, C. F. Thomas, Peytona Lumber Company, a corporation, and Avon Coal & Coke Company, a corporation.

This day came the defendants H. C. Jones, H. C. Jones, Executor of the last will and testament of Hannah C. Jones, deceased, I. P. Baer, Trustee, and I. P. Baer, by their attorneys, M. F. Stiles and I. P. Baer, and the defendants Edwin L. Hall and Barbara V. Hall, his wife, Edwin L. Hall, Trustee, John W. Hall and Cora S. Hall, his wife, William Haddington and Nancy C. Haddington, his wife, Eliza Kleckner, Francis H. Walter, William P. Hall and Anna Hall, his wife, Frank Hall and Gladys T. Hall, his wife, by their attorneys, Price, Smith, Spilman & Clay, and with leave of Court withdrew the plea of not guilty heretofore made by them, and say that they did not, on the dates named in the declaration herein, and do not now, claim any interest in the land described in the declaration, except so much thereof as is included within that certain tract of land which they do claim to own in fee simple situate on the waters of Peter Huff's Creek and the Right Hand Fork of Buffalo Creek in Logan County, West Virginia, bounded as follows:

Beginning at a stake in the Laurel Hollow on the line of Thomas Perry's land, which stake is on the south side of the right hand fork of Buffalo Creek and is a corner of the land deeded by the heirs of John W. Hall deceased to the said I. P. Baer et al, by deed dated April 24th, 1911, and recorded in the office of the Clerk of the County Court of Logan County in Deed Book 34, page 458, and running thence up the ridge in the center thereof to the top of the hill between Riddell Branch of Huff's Creek and the right hand fork of Buffalo Creek, thence on with said ridge to a black gum and hickory a corner to a 28 acre survey bought by one Millard McDonald, thence crossing the ridge in a straight line to a chestnut oak corner to a survey of one H. C. Avis, and thence with said Avis line to a beech corner to a 500 acre survey made for or owned by Wm. Claypool, thence up Huff's Creek in a straight line from the Claypool beech to a stake on the bank of Peter Huff's Creek on the north side there-

of at a point where what is known as the east line of the Henry C. King 500,000 acre survey crosses said Huff's Creek, being the east line run by W. D. Sell, Civil Engineer, when he ran the lines by courses and distances as given in the patent thereof, thence with the said east line as run by said Sell, N. 4 E up the mountain with the lower or west line of a tract of land containing 200 acres more or less conveyed to one J. M. Vance by one Jesse R. Irwin in the year 1900 or 1901, which last mentioned 200 acres more or less is now in litigation between Vance and the Buffalo Creek Coal & Coke Co., and thence still on with the said King line and Vance line to the right fork of Buffalo Creek to a poplar, thence down the right fork of Buffalo Creek on the south side thence but following the meanders of said creek to a stake immediately opposite the beginning, which stake is on the bank of the right hand fork of Buffalo Creek at the mouth of the Laurel Branch, or Marcum Hollow, thence in a southerly direction a straight line to the place of beginning.

And as to that part of the tract described in the declaration, which is included in the tract of land next above described the said defendants, for plea in this behalf, say that they are not guilty of unlawfully withholding the possession thereof from the plaintiff, and of this they put themselves upon their country, and the plaintiff doth the like, and issue is joined thereon.

And also came the defendant, James Doliver Brown, and by leave of court heretofore given, withdrew his plea of not guilty heretofore entered herein and now disclaims and says that at the time of the commencement of this action he did not claim and does not now claim the land in plaintiff's declaration described, except the following portion thereof, situate in Logan county, in said district on the waters of Big Huff Creek, on the north side of said Creek, and bounded and further described as follows, viz: Beginning at a beech, corner to the William Claypool estate; thence up the hill to a hickory at the end of a cliff of rocks, corner to Bruce and Millard McDonald seventy-two acre tract; thence with their line to a sugar tree and rock on top of a ridge near the head of Meridy hollow; thence with the ridge between said branch and Buffalo to a hickory and gum, corner to a thirty-eight acre tract, owned by the

said Claypool heirs; thence crossing the ridge to a chestnut oak, corner to a tract of land owned by H. C. Avis; thence with his line to the beginning, containing five hundred acres, more or less; which land, so described, the said defendant doth claim, and as to the premises last described the said defendant for plea doth say that he is not guilty of unlawfully withholding from the plaintiff the possession thereof, and of this he puts himself upon the country and the plaintiff doth the like.

Thereupon came a jury, to-wit:—C. H. Blake, Richard Butcher, George Canterbury, George W. Curry, Irwin Carper, Byrne Dunn, L. S. Davidson, B. F. Fitzwater, Lee Hendrick, I. D. Humphries, C. F. Hill, and J. B. Jones, all good and lawful men of this Judicial District who were duly tried, empaneled and sworn to well and truly try the issue in this cause, and having heard a portion of the evidence and the hour of adjournment having arrived, and being unable to complete the trial of this cause on this day, are charged by the Court and adjourned over until tomorrow morning at half past nine o'clock.

Memo: Before proceeding to hear any of the evidence in this *casue* R. E. Sherwood was sworn as stenographer to report the same.

And at another day, to-wit: At a District Court of the United States for the Southern District of West Virginia, continued and held at Charleston, in said District, on Tuesday the 1st day of December, 1914, the following order was made and entered of record:

ORDER ADJOURNING TRIAL.

Puffalo Creek Coal & Coke Co.,

vs.) No. 620. In Ejectment.

H. C. Jones et al.

This day came again the parties by their respective attorneys, and the jury empaneled and sworn in this cause appeared in court pursuant to adjournment on yesterday and having heard fully the evidence on behalf of the plaintiff, the defendants, by counsel, moved the court to exclude from the consideration of the jury the evidence introduced on behalf of the plaintiff, which motion was argued in part

by counsel and the hour of adjournment having arrived, and being unable to complete the trial of this cause on this day, the said jury is charged by the court and adjourned over until tomorrow morning at half-past nine o'clock.

BENJ. F. KELLER,
District Judge.

And at another day to-wit: At a District Court of the United States for the Southern District of West Virginia continued and held at Charleston in said District on Wednesday, the 2nd day of December, 1914, the following order was made and entered of record:

ORDER ADJOURNING TRIAL.

Buffalo Creek Coal & Coke Co.,
vs.) No. 630. In Ejectment.
H. C. Jones et al.

This day came again the parties by their respective attorneys and the jury empaneled and sworn in this cause appeared in court pursuant to adjournment on yesterday, and the court having heard fully the arguments of counsel upon the motion heretofore made to exclude the evidence of the plaintiff from the consideration of the jury, and having maturely considered the same, doth overrule the said motion, to which action and ruling of the court, counsel for the defendant object and except. And thereupon the defendant proceeded to the introduction of evidence upon their behalf, and the hour of adjournment having arrived and being unable to complete the trial of this cause on this day, the said jury is charged by the court and adjourned over until tomorrow morning at half past nine o'clock.

BENJ. F. KELLER,
District Judge.

And at another day, to-wit: At a District Court of the United States for the Southern District of West Virginia, continued and held at Charleston, in said District on Thursday, the 3rd day of December, 1914, the following judgment was made and entered of record:

JUDGMENT.

Buffalo Creek Coal and Coke Company et al, Plaintiffs,
vs.) In Ejectment: No. 630.

H. C. Jones et al, Defendants:

This day came again the parties, by their attorneys, and the jury returned into court pursuant to their adjournment on yesterday; and the parties having introduced all their evidence, the plaintiffs, by their attorneys, moved the Court to direct the jury to find and return a verdict for the plaintiffs for the land in controversy; to the granting of which motion the defendants, by counsel, objected, which objection was overruled and said motion sustained in part and overruled in part; to which ruling and opinion of the Court the defendants, by their attorneys, excepted; and, thereupon, the jury returned a verdict, by the direction of the Court, and which verdict is in the words and figures following, to-wit:

“In obedience to instructions of the Court, we the jury, find for the plaintiffs on the issue joined on the second count in the declaration, and we further find that the plaintiff, the Buffalo Creek Coal and Coke Company, is seized of an estate in fee simple, and that the plaintiff, Avon Coal Company, is entitled to an estate for forty (40) years from the 27th day of February, 1911, with the privilege of renewal for a like period, under its coal mining lease, in and to all that part of the land mentioned and described in the second count in the declaration not disclaimed by the defendants in their disclaimer of record, which part of said land is described and bounded as follows: Situate in Triadelphia District of Logan County, West Virginia, between Big Huffs Creek and the Right Fork of Buffalo Creek, Beginning at a stake in the Laurel Hollow on the line of Thomas Perry's land, which stake is on the south side of the right fork of Buffalo Creek and is a corner of the land deeded by the heirs of John W. Hall, deceased to the said I. P. Baer, et al, by deed dated April 24, 1911, and recorded in the office of the Clerk of the County Court of Logan County in Deed Book 34, page 458, and running thence up the ridge, in the center thereof, to the top of the hill between Riddell Branch of Huffs Creek and the right hand fork of Buffalo Creek, thence on with said ridge to a black

gum and hickory, a corner to a twenty-eight acre survey bought by one Millard McDonald, and with the lines of said twenty-eight acre tract S. 50 E. 561 feet to a poplar and hickory, corner of same, due West 300 feet, more or less, to a point on the line of said twenty-eight acres (where a straight line drawn from the black gum and hickory, above named, to a chestnut oak, corner to a survey of one H. C. Avis, would intersect said due West line) thence leaving the said twenty-eight acres, and with a straight line (the course of which is fixed by the black gum and hickory above named as the northern end of same) to a chestnut oak corner to a survey of one H. C. Avis, and thence with said Avis line to a beech corner to a 500 acre survey made for or owned by Wm. Clavpool, thence up Huffs Creek in a straight line (with such a course that will terminate at a stake on the North side of said Huffs Creek at a point where what is known as the east line of the Henry C. King 500,000 acre survey crosses said Huffs Creek, being the east line run by W. D. Sell, Civil Engineer, when he ran the lines by courses and distances as given in the patent thereof) a distance of about 800 feet, more or less, to a point where the last described line intersects the line of the 2165.92 acres mentioned in the plaintiffs' declaration, and with said 2165.92 acre line N. 64° 03' W. about 400 feet, more or less, to a stake, N. 3° 29' W. 6358.13 feet to a stake on a hill side and about 200 feet from the right fork of Buffalo Creek and continuing said N. 3° 29' W. line about 200 feet to the south bank of said right fork of Buffalo Creek, and down the same on the south side, but following the meanders of said creek to a stake immediately opposite the beginning, which stake is on the bank of the right fork of Buffalo Creek at the mouth of Laurel Branch or Marcum Hollow, thence a southerly direction a straight line to the place of beginning, save and except the land on Jim Dolliver Branch, cleared and claimed by the defendant James Dolliver Brown, and bounded as follows:

Beginning in said branch where the easterly line of the seventy-six acre school section crosses said branch, thence up said branch with the meanders thereof to the line binding the land in the declaration mentioned and described on the easterly side and running from near Big Huffs Creek to the Right Fork of Buffalo Creek on a bearing

of N. 3° 29' West; thence with said line N. 3° 29' West across the field to the fence and at the edge of the woods; thence down the creek following the fence and the edge of the woods with the meanders thereof to the lynn corner of said school section; thence with the easterly line of said school section to the place of beginning; containing fifteen acres, more or less, and also including the cleared land at the beginning corner and lying on the right side of said branch and inclosed by fence; which last mentioned tract we find is owned in fee simple by James Dolliver Brown.

And we further find one cent damages for the plaintiff against the defendants other than James Dolliver Brown."

It is, therefore, considered by the Court that the plaintiff, Buffalo Creek Coal and Coke Company, is seized of an estate in fee simple, and that the plaintiff Avon Coal Company is entitled to an estate for forty (40) years from the 27th day of February, 1911, with the privilege of renewal for a like period, under its coal mining lease, in and to the land mentioned and described in the verdict of the jury, and that said plaintiffs recover of said defendants the possession of the lands so described in said verdict; except that part of said land hereinafter described and for which the jury returned a verdict for the defendant, James Dolliver Brown.

And the Court doth further consider and adjudge that the defendant James Dolliver Brown is seized of an estate in fee simple and entitled to retain possession of the parcel of land mentioned in said verdict and saved and excepted from the boundary of land described in said verdict; namely:

Beginning in said branch where the easterly line of the 76 acre school section crosses said branch thence up said branch with the meanders thereof to the line binding the land in the declaration mentioned and described on the easterly side and running from near Big Huffs Creek to the right fork of Buffalo Creek on a bearing of N. 3° 29' West; thence with said line N. 3° 29' West across the field to the fence and at the edge of the woods; thence down the creek following the fence and the edge of the woods with the meanders thereof to the lynn corner of said school section; thence with the easterly line of said school section to the

place of beginning; containing fifteen (15) acres, more or less, and also including the cleared land at the beginning corner and lying on the right side of said branch and enclosed by a rail fence.

The Court doth further consider that the plaintiffs recover of the defendants other than said James Dolliver Brown, one cent damages, assessed by the jury as aforesaid, and that the plaintiff also recover of said defendants, other than the defendant James Dolliver Brown, their costs about the prosecution of their action in that behalf expended, including ten (\$10.00) dollars allowed by law.

And thereupon the defendants, H. C. Jones, H. C. Jones, Executor of the last will and testament of Hannah C. Jones, deceased, James Doliver Brown, I. P. Baer and I. P. Baer, Trustee, by Maynard F. Stiles, Esq., and I. P. Baer, Esq., their counsel, and the defendants Edwin L. Hall and Barbara Hall, Edwin L. Hall, Trustee, John W. Hall and Cora S. Hall, William Haddington and Nancy Haddington, Eliza H. Kleckner, Francis H. Walter, William P. Hall and Anna Hall, Frank Hall and Gladys F. Hall, by Price, Smith, Spilman and Clay, their attorneys, severally moved the Court to set aside said judgment and the verdict returned by the jury by direction of the Court and grant them a new trial, upon the ground that said verdict and judgment are, and each of them is, contrary to the law and the evidence; and because the jury were not permitted by the Court to find their own verdict upon the matters of fact in issue between the plaintiffs and the said defendants; and because of the admission in evidence over the objection of said defendants and the consideration by the Court of sundry papers, documents, instruments and writings and testimony offered in evidence in behalf of the plaintiff, which were immaterial, incompetent and inadmissible as evidence, and because of the exclusion and striking out by the Court of material relevant, competent and important evidence offered on behalf of said defendants; and because of other errors committed by the Court upon the trial of said cause, which motion of said defendants is set down for argument at a later day to be hereafter fixed by the court.

And at another day, to-wit: At a District Court of the United States for the Southern District of West Virginia continued and held at Charleston, in said District, on Tuesday, the 30'' day of March, 1915, the following order was made and entered of record:

ORDER OVERRULING MOTION FOR NEW TRIAL.

Buffalo Creek Coal & Coke Company
vs.) *In Ejectment. No. 630.*
H. C. Jones et al.

This day came again the parties, by their attorneys, and the Court having maturely considered the motion made by the defendants to set aside the verdict and vacate the judgment entered thereon herein and grant the defendants a new trial, is of opinion to and doth overrule the said motion and doth refuse to set aside said verdict and vacate said judgment. To which action of the Court in refusing to set aside verdict and vacate said judgment and grant a new trial, the defendants duly excepted.

Upon motion of the defendants, they are given 60 days in which to prepare and present bills of exception.

And at another day, to-wit: At a District Court of the United States for the Southern District of West Virginia continued and held at Charleston, in the said District, on Friday, the 28'' day of May, 1915, the following order was made and entered of record:

ORDER ENLARGING TIME FOR SETTling BILL OF EXCEPTIONS.

Buffalo Creek Coal & Coke Company,
vs.) *No. 630. In Ejectment.*
H. C. Jones, et als.

On motion of the defendant, and for good cause appearing to the Court, it *it* ordered that the time for presentation and settlement of defendants' bill of exceptions heretofore fixed by order of this Court, be, and the same is hereby, enlarged and extended ten days.

And at another day, to-wit: At a District Court of the United States for the Southern District of West Virginia, continued and held at Charleston, in said District, on Tuesday the 8th day of June, 1915, the following order was made and entered of record.

ORDER SETTLING BILL OF EXCEPTIONS.

Buffalo Creek Coal & Coke Company,

vs.) In Ejectment.

H. C. Jones et als.

This day came the parties by their respective counsel, and the defendants presented to the court, within the time heretofore fixed therefor, their bill of exceptions herein, and the same being approved and signed and sealed by the court, it is ordered by the court that the said bill of exceptions be and the same is hereby filed as a part of the record in this cause.

The bill of exceptions referred to in the foregoing order is in words and figures as follows:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA.

Buffalo Creek Coal & Coke Company, a corporation, Plaintiff,

vs.) In Ejectment.

H. C. Jones et als., Defendants.

DEFENDANTS' BILL OF EXCEPTIONS.

EXCEPTIONS NO. 1.

Be it remembered that upon the trial of this cause the plaintiff, to sustain the issues upon its part, introduced and read in evidence to the court and jury a stipulation of facts entered into between counsel for plaintiff and counsel for defendants, which stipulation is in words and figures following, to-wit:

IN THE CIRCUIT COURT OF LOGAN COUNTY,
WEST VIRGINIA.

Buffalo Creek Coal & Coke Company, a Corporation, Plaintiff,

vs.) In Ejectment.

H. C. Jones, H. C. Jones, Executor of the last will and testament of Hannah C. Jones, deceased; James Doliver Brown, I. P. Baer, Trustee; I. P. Baer, Edwin L. Hall, and Barbara V. Hall, his wife; Edwin L. Hall, Trustee, John W. Hall, and Cora S. Hall, his wife; William Haddington and Nancy Haddington, his wife; Eliza H. Kleckner, Francis H. Walter; William P. Hall, and Anna Hall, his wife; Frank Hall and Gladys T. Hall, his wife; C. F. Thomas, Peytonia Lumber Company, a corporation, and Avon Coal Company, a corporation, Defendants.

It is stipulated by counsel representing the plaintiff and counsel representing the defendants, except the above named Cooks, that the following are facts and matters of record in the chain of title of the plaintiff in this cause, and that this stipulation may be used in lieu of the proof of the facts herein stipulated, and the records herein described, it being understood, however, that either party may introduce for amplification or greater clearness any of the papers referred to in this stipulation. And it being further understood and agreed that defendants do not waive, but expressly reserve the right to object to the introduction or use in evidence of any of the said facts or records upon the ground of irrelevancy or immateriality of such facts or records or their incompetency for any other reason than the non-production or the originals or proper copies of said deeds, papers and records, or regular proof of such facts.

—3—

That on the 28th day of June, 1893, Jesse R. Irwin, Harris Hoyt, Marie E. Hoyt, Alvin Irwin and Marie Irwin made a deed to *Tmma* Idelia Pomerov, which deed was duly recorded in the office of the Clerk of the County Court of Logan County, West Virginia in Deed Book "R" page 167. A copy of which deed is hereto attached as a part

of this agreement marked Exhibit 1. And that the land in controversy in this suit, and described in the plaintiffs declaration lies entirely within the boundary described in and purported to be conveyed by said deed to the said Emma Idelia Pomeroy.

—4—

That for the year 1894, the same Emma Idelia Pomeroy had entered upon the land books of Triadelphia District (the district in which said land is situated) Logan County, West Virginia, and was assessed with taxes thereon with 20.000 acres, with the notation in the column marked "Description, etc." as follows: "transferred from Alvin Irwin and Marie E. Hoyt," which taxes so assessed were not paid, and said land was returned delinquent, and in pursuance of said delinquency sold in December, 1895, and purchased by the State of West Virginia, and was not redeemed within the year allowed for redemption of land sold at tax sales, and was on the 3d day of May, 1897, certified by the Auditor of the State of West Virginia to the Commissioner of School lands of Logan County, as liable to sale for the benefit of the School Fund.

—5—

Thereupon, Joseph W. Hinchman, Commissioner of School Lands of Logan County, West Virginia, reported to the Circuit Court of Logan County forty-three (43) tracts liable for sale in pursuance of Chapter 105 of the Code of West Virginia, and asked to be Allowed to institute suit in the name of the State of West Virginia against the land mentioned in said report for the sale thereof, which report was recorded in Chancery Order Book "G", page 52 of the said Court.

On the 3rd day of May, 1897, suit was directed to be brought for the sale of the said forty-three tracts of land described in said report, and on the 17th day of June, 1897, said Commissioner of School Lands instituted a suit styled State of West Virginia vs. Jesse R. Irwin, et als., for the purpose of selling Tracts Nos. 42 and 43 in the above mentioned report, a copy of which report and an order directing said suit, and the proceedings in the cause of the State

of West Virginia vs. Jesse R. Irwin, et als., are hereto attached as a part of this agreement, marked Exhibit No. 2.

—6—

That on the 12th day of November, 1898, J. B. Wilkinson Special Commissioner, executed a deed in pursuance of the decree above set out, to W. H. Stoddard and Amos C. Hall, which deed is of record in the office of the Clerk of the County Court of Logan County, West Virginia, in Deed Book "T" page 133, a copy of which deed is hereto attached as part of this agreement, marked "Exhibit No. 3."

—7—

That by the several *mense* deeds executed, delivered and recorded in due form of law, upon the following dates, between the following parties, recorded in the office of the County Clerk of the County Court of Logan County, West Virginia, in the following deed books and pages, and by the herein mentioned course of descent, to-wit:—

By deed dated January 4, 1900, from W. H. Stoddard and wife and Amos C. Hall and wife to Henry Patton, Trustee, recorded in Deed Book "W", page 352.

By written declaration of trust by Henry Patton, Trustee, whereby said Henry Patton Agreed to, and declared that he did hold said land as trustee for himself, W. H. Stoddard, Amos C. Hall, and O. L. Snyder.

By deed dated April 1st, 1904, from said Henry Patton, Trustee, and Henry Patton, together with W. H. Stoddard, Amos C. Hall and O. L. Snyder to M. B. Mullins, recorded in Deed Book "X", page 405;

By the death on the 16th day of January, 1906, of M. B. Mullins intestate, leaving May Mullins, his widow, and Milton A. Mullins, his sole heir and distributee him surviving;

By deed dated October 26, 1906, from said Milton A. Mullins and wife, to U. B. Buskirk, Trustee, recorded in Deed Book 30, at page 14, excepting, however, all that portion of said land conveyed by M. B. Mullins in his lifetime to Harmon Newberry and J. A. Collins, which said portion so conveyed to said Newberry and Collins aggregates 5200

acres, and is situated on Elk Creek and is no part or parcel of the land in controversy in this suit;

By contract in writing, under seal, U. B. Buskirk, Trustee, agreed to and declared that he did hold said land in trust for U. B. Buskirk an undivided one-third, for J. Cary Alderson an undivided one-third, for R. L. Shrewsbury an undivided one-sixth, and for W. R. Lilly an undivided one-sixth.

By deed dated June 8, 1907, from U. B. Buskirk, Trustee, U. B. Buskirk and wife, J. Cary Alderson and wife, R. L. Shrewsbury and wife and W. R. Lilly and wife, together with W. K. Cowden, Trustee and others, (the said W. K. Cowden, Trustee, and others, claiming said land under the DeWitt Clinton grant of 142,000 acres, by patent dated February 19th, 1796) to Buffalo Coal & Coke Company, recorded in Deed Book 28, page 457;

By deed dated August 15, 1911, from Buffalo Coal & Coke Company to Hector Coal Land Company recorded in Deed Book 25, page 190;

By deed dated August 15, 1911, from Buffalo and Coke Company to Hector Coal Land Company, recorded in Deed Book 25, page 190;

By deed dated March 23, 1907, from May Mullins, widow of M. B. Mullins, to Logan Realty Company, recorded in Deed Book 31, page 336;

By deed dated on the _____ day of _____ 1910, from Logan Realty Company to J. E. Crawford, recorded in Deed Book 34, page 48;

By deed dated October 14, 1912, from J. E. Crawford and wife to Hector Coal Land Company, recorded in Deed Book 73, page 305;

By deed dated February 6, 1913, from Hector Coal Land Company, the plaintiff, recorded in Deed Book 37, page 427, the land described in plaintiff's declaration, being included within the boundaries of the deeds mentioned above in this paragraph; all the right, title, interest and estate acquired by the said W. H. Stoddard and Amos C. Hall, under and by virtue of the proceedings in the cause of the State of West Virginia against Jesse R. Irwin, et als., hereinbefore set out, as well as by the deed also hereinbefore set out from said J. B. Wilkinson, Special Commissioner to the said W. H. Stoddard and

Amos C. Hall, passed from the said W. H. Stoddard and Amos C. Hall to, the Hector Coal Land Company, the Plaintiff, and also all the right, title interest and estate acquired by any of the above mentioned parties under section 3, Article 13 of the Constitution of the State of West Virginia, and by virtue of an act of the Legislature of the State of West Virginia, passed in the year 1905, amending Sections 6 and 19 of Chapter 105 of the Code of West Virginia, and also all the right, title, interest and estate acquired by any of the above mentioned parties under the proceedings or decrees in the cause of the State of West Virginia against Henry C. King, et als., and the State of West Virginia against Alexander McClintock, et als., hereinafter set out, passed to the Plaintiff, Hector Coal Land Company.

But the defendants, other than the Peytonia Lumber Company and the Avon Coal Company do not hereby concede, agree, or admit that any title passed to the said W. H. Stoddard and Amos C. Hall to the land in controversy on account of the proceedings in the cause of the State of West Virginia against Jesse R. Irwin, et als., and the deed from J. B. Wilkinson, Special Commissioner, to W. H. Stoddard and Amos C. Hall, or that any of the above mentioned parties have acquired any title to the land in controversy by virtue of Section 3, Article 13, of the Constitution of the State of West Virginia; or an act of the Legislature; passed in the year 1905, amending Sections 6 and 19 of Chapter 105 of the Code of West Virginia, or on account of the proceedings or decrees had in the cause of the State of West Virginia against Henry C. King, et als., or the State of West Virginia against Alexander McClintock, et als., or otherwise;

It being the purpose of this Paragraph 7, to admit the conveyances and descent herein described as the Plaintiffs chain of title through the persons herein mentioned, from the Stoddard and Hall to the Plaintiff, placing the Buffalo Creek Coal Coke Company as successor to such rights, and only such rights to the land in the declaration as vested in Stoddard and Hall as aforesaid and in the several persons between said Stoddard and Hall and the Plaintiff as aforesaid. But nothing hereinbefore stated or agreed to is to be construed to prevent the defendants from proving

outstanding title by forfeiture or otherwise as to any *the* person in said chain of title.

—9—

It is agreed that assessments of land for taxation have been made to Stoddard and Hall and their successors, as shown in the following certificate of the Auditor of the State of West Virginia, which is hereto attached as Exhibit No. 4.

—10—

It is also agreed that the land in controversy has not been assessed to the defendants except as shown by the certificate of the Auditor of the State of West Virginia, which certificate is hereto attached, marked Exhibit No. 5.

—11—

That on the 7th day of May, 1894, the State of West Virginia, as plaintiff, instituted a suit in chancery, in the Circuit Court of Wyoming County, styled State of West Virginia, against Henry C. King, et als., the object of which suit was to sell for the benefit of the School Fund, the tract of 500,00 acres of land granted to Robert Morris by the Commonwealth of Virginia on the 23rd day of June, 1795, and which 500,000 acre grant had become forfeited to said State of West Virginia for the failure of the former owners to have said land entered upon the land books, and charged with taxes thereon for more than five (5) successive years prior to the institution of said suit, to which said grant of 500,000 acres, the said Henry C. King had a chain of title derived by a regular chain of deeds, decrees, etc., from the original grantee, Robert Morris. Said suit being a regular proceeding under Chapter 105 of the Code of West Virginia, to sell for the benefit of the School Fund, said tract of land forfeited to the state as aforesaid. The said grant of 500,000 acres embraced and included within the bounds thereof all of the land in controversy in this suit between the plaintiff, Buffalo Creek Coal Coke Company and the defendants herein mentioned.

That at the May rules, 1894, The State of West Virginia

complainant in the cause of the State of West Virginia, against Henry C. King, et als, filed its original bill of complaint, alleging in a formal way the facts and objects above set out as the purpose thereof and praying for the sale of said Land. That later the first, second, third and fourth amended bills were filed in said suit by the State, the original bill, and the first, second, and third amended bills being substantially the same, as the fourth amended bill, which fourth amended bill is attached as a part of this agreement, marked Exhibit No. 6.

That the said cause was matured for hearing, by entering, publishing and posting of the proper order of publication in said cause, as to all of the parties mentioned in said fourth amended bill, and by the filing of an answer for the infant defendants in said bill by Guardian ad litem.

Thereupon Alexander McClintock filed a petition in said cause, a copy of which is hereto attached, marked Exhibit No. 7.

Thereupon Henry C. King filed his answer in said cause, denying the forfeiture of said 500,000 acre grant, and *dereigning* claim of title to said grant from Robert Morris, the original Patentee, and setting out a list of parties stated to claim said land adversely to the claim made by the State of West Virginia, and himself, under the 500,000 acre grant, and asking that the adverse claimants be made parties defendant to the suit, the fourth adverse claim being as follows, "Emma I Pomeroy 20,000 acres north of Guyandotte River, part of the 480,000 acre survey claimed by Jesse R. Irwin and others, mentioned in plaintiff's bill, and exhibit filed therewith, Book R, page 167."

Thereupon said cause was referred to D. A. Robertson, Commissioner In Chancery, who, later made and filed a report in said cause, finding said 500,000 acre grant forfeited to the state, and estimated there was 10,000 acres of said 500,000 acre grant was not claimed by prior claimants, upon which the said Commissioner calculated the taxes, interest, etc., and after the filing of said report, to-wit; on the 30th day of September, 1897, a decree was entered in said cause, allowing the said Henry C. King to redeem the West Virginia portion of the said 500,000 acre grant, according to a re-survey made thereof by W. D. Sell, which survey, *which survey* so made by W. D. Sell

embraced and included *withing* the boundaries of the 500,000 acres, all of the land in controversy in this suit.

After the entering of the decree of September 30, 1897, the State of West Virginia obtained an appeal from the Supreme Court of Appeals of West Virginia, from said decree, which appeal being matured and heard, the Supreme Court of Appeals of West Virginia reversed said decree, "In so far as it allows Henry C. King to redeem the land described in the decree by reason of the payment of the sum of \$3090.08, costs, taxes and interest as fixed by the Circuit Court, and in so far as it ascertains and fixes the cost, interest and taxes to be paid."

In all other respects, the decree was affirmed and the cause remanded to the circuit court of Wyoming County for further proceedings. The mandate on said appeal was entered on the 7th day of February, 1900.

After the cause was remanded to the circuit court of Wyoming County on the 28th day of June, 1900, the cause was removed to the circuit court of Logan County, and after being docketed in that court on the 27th day of July, 1900, an amended bill was filed, known as the "fifth amended bill," bringing in a number of new parties, being the parties mentioned in the first answer of Henry C. King, as the parties claiming adversely to the 500,000 acre grant.

The cause was then transferred to, and docketed in the circuit court of Cabell County, in which court, on the 22nd day of March, 1901, Henry C. King filed an amended petition and answer, claiming title as in his first answer, to the 500,000 acre grant, but mentioning certain tracts of land claimed adversely to the 500,000 acre grant, which he did not desire to redeem, none of which last tracts, however, cover any of the land in controversy in this suit.

On the 5th of July, 1901, William H. Stoddard and Amos C. Hall filed a petition in this cause which petition is attached hereto as Exhibit No. 8, to which petition of said Stoddard and Hall, Henry C. King on the 11th day of April, 1903, filed an answer, denying the title claimed by Stoddard and Hall under title dereigned by them in their petition.

On the 28th day of December, 1903, the cause was re-

moved from the circuit court of Cabell County to the circuit court of Marion County, wherein it was docketed on the 28th day of February, 1904.

On the 18th day of July, 1904, M. B. Mullins filed his petition in said cause, alleging that he had purchased from Henry Patton, Trustee, the 20,000 acres claimed by Stoddard and Hall, dereigning his title through Henry Patton, Trustee, and Stoddard and Hall, under the proceedings in said cause of the State of West Virginia against Jesse R. Irwin, et als, and also filed a motion to dismiss said land from the suit, to which petition of Mullins', Henry C. King, on June 27, 1905, filed a demurrer and answer, contesting the right of said Mullins to have said land dismissed, and controverting the title set up by Mullins under the purchase in the cause of the State of West Virginia against Jesse R. Irwin, et als.

On the 27th day of June, 1905, amendments to the motion and petition of Mullins, filed as aforesaid, and an amended answer of Henry C. King to said motion and petition was filed.

On the 3rd day of December, 1906, U. B. Buskirk, Trustee, filed a petition in said cause, alleging that he had purchased from Milton A. Mullins, the interest owned by M. B. Mullins, in his lifetime, to the 20,000 acres claimed under the proceedings in the cause of the State of West Virginia against Jesse R. Irwin, et als., and asked to be, and was made a party defendant in said cause, to which petition of Buskirk, Trustee an answer was filed by Henry C. King, on the 5th day of March, 1907.

On the 3rd of June, 1907, U. B. Buskirk, Trustee, U. B. Buskirk, J. Cary Alderson, R. L. Shrewsbury and W. R. Millv, filed a petition in said cause, a copy of which is hereto attached, marked Exhibit No. 9.

On the same day, said Henry C. King filed his demurrer and answer to said petition, which is hereto attached as Exhibit No. 10.

On the 11th day of January 1908, the circuit court of Marion County, entered a decree in said cause, a copy of which is hereto attached, marked Exhibit No. 11.

There is omitted from this decree the description of the several tracts dismissed thereby, except Tract No. 4,

which *embran-es* and includes all of the land in controversy in this suit.

The land dismissed by said decree is shown on the Blue Print copy of exhibit marked "Map U. B. B., filed with the said petition of U. B. Buskirk, Trustee," which Blue Print map is here inserted in this agreement as Exhibit No. 12. The exterior boundaries of tract No. 4, being indicated on said map by red lines.

The tract described in the deed from C. F. Thomas to J. B. Ellison and I. P. Baer, dated the 23rd day of October, 1911, as shown in.....lines on said Blue Print.

The tract described in the deed from Naaman Jackson, Trustee, to James Doliver Brown, dated the 26th day of July, 1905, is shown in..... lines on said Blue Print. These last two tracts were put on this map in November, 1914, by W. D. Sell, C. E.

From the decree of January 11, 1908, Henry C. King obtained an appeal to the Supreme Court of Appeals of West Virginia, which appeal was heard in the said court, and said decree affirmed by the said Supreme Court.

Thereupon Henry C. King obtained a writ of error from the Supreme Court of the United States to the decree, affirming the decree of January 11, 1908, which writ of error was, by the Supreme Court of the United States, dismissed for want of jurisdiction.

It is agreed that the said C. F. Thomas, mentioned as a party in the cause of the State of West Virginia against Henry C. King, et als, is the same C. F. Thomas, who executed the deed above mentioned to J. B. Ellison and I. P. Baer.

State of West Virginia

vs.

Alexander McClintock, et als.

In the year 1893, the State of West Virginia as plaintiff instituted a suit in the circuit court of Logan County, against Alexander McClintock, et als., and filed its bill therein at the July rules of said year, a copy of which bill is hereto attached, marked Exhibit No. 13.

On the 9th day of September, 1893, an order was en-

tered in said cause, a copy of which is hereto attached marked Exhibit No. 14.

On the 19th day of June, 1894, J. Cary Alderson, Commissioner in Chancery, filed his report, a copy of which is hereto attached marked Exhibit No. 15.

On the 19th day of June, 1894, Alexander McClintock filed his petition in said cause, a copy of which is hereto attached, marked Exhibit No. 16.

On the 20th day of June, 1894, a decree was made in the said cause, a copy of which is hereto attached, marked Exhibit No. 17.

Thereupon Henry C. King filed a petition in said cause, dereigning his title as in the cause of the State of West Virginia against Henry C. King, et als., to the 500,000 acre grant, alleging that the 500,000 acre grant interlocks with the 142,000 acre DeWitt Clinton grant which DeWitt Clinton grant was junior to the 500,000 acre grant.

This cause was thereupon transferred to the circuit court of Kanawha County, and later transferred to the circuit court of Marion County, in which court, on the 18th day of October, 1906, an amended bill was filed, a copy of which is hereto attached, marked Exhibit No. 18.

Upon which amended bill an injunction was granted as prayed for, and certain timber in the amended bill sold by S. B. Robertson, Special Receiver, and the proceeds of said timber disposed of by various orders entered in said cause.

Thereupon said cause was transferred to *be* circuit court of Logan County, West Virginia, and docketed in said court on the 6th day of December, 1906, Henry C. King filed an answer to the amended bill of complaint of this cause, a copy of which is hereto attached as Exhibit No. 19.

On the 30th day of July, 1907, a decree was entered in said cause, a copy of which is hereto attached, marked Exhibit No. 20.

On the 15th day of February, 1910, the Buffalo Coal & Coke Company and the Altizer Coal Land Company filed their petition in said cause, a copy of which is hereto attached marked Exhibit No. 21.

On the 26th day of April, 1910, Robert Bland filed his report in said cause, a copy of which is hereto attached, marked Exhibit No. 22.

On the 4th day of May, 1910, a decree was entered in said cause, a copy of which is hereto attached, marked Exhibit No. 23.

The description of the six parcels of land decreed to be sold in this decree is omitted from this copy of said decree, said land so directed to be sold being situated outside of the Pomeroy tract, described in the deed from Jesse R. Irwin to Emma I Pomeroy, and outside of the land in controversy in this suit.

It is agreed that the land in controversy in this suit is embraced within the boundaries described deed dated the 8th day of June, 1907, from W. K. Cowden, Trustee, et als., to the Buffalo Coal & Coke Company, a duly certified copy of which was filed as Exhibit No. 9, with the petition of the Buffalo Coal & Coke Company and the Altizer Coal Land Company, and that said deed is the same deed hereinbefore referred to as being made on the same date between U. B. Buskirk, Trustee, et als., in which said W. K. Cowden Trustee, et als., joined.

It is agreed that a copy of the DeWitt Clinton grant of 142,000 acres mentioned in the foregoing proceedings is hereto attached, marked Exhibit No. 24.

It is further agreed that the various exhibits mentioned and described in the various pleadings in the cause of the the State of West Virginia against Henry C. King, et als., and the State of West Virginia against Alexander McClintock et als. above set out, are omitted from the copies of the pleading herein set out, it being now believed that the pleadings sufficiently indicate the purport and legal effect of the exhibit for the purpose of this suit, but either party has the right, on the trial of this case, if they so desire, to introduce any of the said exhibits, without having said exhibits duly certified.

C. N. DAVIS,

W. R. LILLY,

Counsel for Plaintiff.

MAYNARD F. STILES,

E. C. HARRISON,

I. P. BAER,

Counsel for Defendants.

And thereupon the plaintiff further offered in evidence an instrument of writing, dated July 28, 1893, purporting to be a deed from Jesse R. Irwin and others to Emma Idalia Pomeroy, and being the instrument referred to in said stipulation as "Exhibit No. 1" and which is in words and figures as follows, to-wit:

EXHIBIT "1".

(Irwin et al. to Pomeroy.)

This Deed made the 28th day of July 1893 between Jesse R. Irwin, Harris Hoyt and Marie E. Hoyt, his wife, Alvin Irwin and Marie his wife the said Harris Hoyt and Marie E. Hoyt are residents of London England and Jesse R. Irwin, Alvin Irwin and Marie Irwin being residents of Kanawha County State of West Virginia of the first part and Emma Idalia Pomeroy of New York County and State of New York of the second part.

Witnesseth that in consideration of the sum of one hundred thousand dollars being at the price of five dollars per acre, the receipt of which is hereby acknowledged, the parties of the first part do grant unto the said Emma Idalia Pomeroy, all their right title, and interest in and to the following described Real Estate situate, lying and being in the County of Logan, State of West Virginia and bounded and described as follows to wit: Beginning at a stone on the north line of the Sarver Survey of the 480,000 acres Morris tract at the point where the Guyandotte River crosses the said line and on the easterly bank of the said river thence running in a southerly direction following the meanderings of the Guyandotte river crossing the Buffalo and Big Huff creeks at their mouths about five *thousands* and seven hundred and sixty poles to where the said river crosses the Wyoming County line thence running in a northeasterly direction with the said county line about four thousand eight hundred poles to a stone where the said Wyoming County line crosses the North line of said survey thence with the said north *lunc* of the said Sarver Survey about three thousand eight hundred and forty poles to the place of beginning containing twenty thousand acres more or less after deducting from the boundary aforesaid all legal junior grants and school sales.

The said parties of the first part covenant to and with the said Emma Idalia Pomeroy that they have the right to convey the said land to the grantee and that they will warrant generally the property hereby conveyed.

Witness the following signatures and seals:

JESSE R. IRWIN. (Seal)

HARRIS HOYT. (Seal)

MARIE E. HOYT. (Seal)

ALVIN IRWIN (Seal)

MARIE IRWIN (Seal)

State of West *Virginai*,

County of Kanawha, to-wit:

I, Walter L. Ashby a notary Public in and for the county of Kanawha aforesaid do certify that Marie Irwin whose name is signed to the writing above bearing date on the 28th day of July 1893 has this day acknowledged the same before me in my said county.

Given under my hand this 31st day of July, 1893.

WALTER L. ASHBY, *Notary Public.*

To the introduction or consideration of which deed in evidence the defendants, by counsel, objected, for the reason that the same was incompetent, it not appearing that the grantors therein had title to the land sought to be conveyed thereby; which objection the court later overruled, and said deed was read in evidence to the jury; to which action of the court, in overruling said objection and allowing said deed to be read in evidence, the defendants, by counsel, excepted and prayed that said exception be saved to them and be made part of the record, which is accordingly done. And this is defendants' First Exception.

EXCEPTION NO. 2.

Be it also remembered that, upon the trial of said cause, the plaintiff, further to sustain the issues on its part, offered in evidence a copy of the report of Joseph W. Hinchman, Commissioner of School Lands, of Logan County, directing a suit to be brought for the sale of the lands mentioned in said commissioner's report; the bill of the State of West Virginia against Jesse R. Irwin and others, brought in

said court pursuant to said order, and sundry decrees and proceedings had in said cause, and which are referred to as Exhibit No. 2 in the stipulation above set out, and which are in words and figures as follows, to-wit:

EXHIBIT NO. "2".

(Record of State v. Irwin et als.)

Proceedings had in the Circuit Court of Logan County, West Virginia, in the Chancery Cause of the State of West Virginia vs. Jesse R. Irwin et al.

To the Honorable E. S. Doolittle, Judge of the Circuit Court of Logan County, West Virginia:

Your undersigned Commissioner of School Lands would respectfully report to Your Honor the following tracts of land which have been reported to him by the Auditor of the State of West Virginia as forfeited for the non-payment of taxes due thereon, and are liable to be sold under the provisions of Chapter 105 of the Code of West Virginia, and as amended by the Acts of 1893, Chapter 24, for the benefit of the School Fund, which tracts of land are situate in the County of Logan and described as follows:

No. 1. One tract containing 460 acres, and forfeited in the name of Catherine Bumgardner.

Tract No. 2, containing five hundred acres. and forfeited in the name of John Claypool's heirs.

Tract No. 3, containing 48 acres, forfeited in the name of G. S. Claypool.

Tract No. 4, containing 460 acres and forfeited in the name of W. R. Hughes.

Tract No. 5, containing 15½ acres, and forfeited in the name of Joseph Vance.

Tract No. 6, containing 67½ acres forfeited in the name of George Burgess.

Tract No. 7, containing 10 acres and forfeited in the name of Patterson Christian.

Henry C. King vs. The State of West Virginia et al.

Tract No. 8, containing 34 acres, and forfeited in the name of Patterson Christian.

Tract No. 9, containing 12 acres, forfeited in the name of Patterson Christian.

Tract No. 10, containing 80 acres, and forfeited in the name of Geneva Cartright.

Tract No. 11, containing 147 acres, and forfeited in the name of A. E. Ellis.

Tract No. 12, containing 20 acres of mineral, forfeited in the name of S. P. Kelly.

Tract No. 13, containing $1\frac{3}{4}$ acres, forfeited in the name of Ida J. McDonald's heirs.

Tract No. 14, containing 107 acres, forfeited in the name of Ida J. McDonald's heirs.

Tract No. 15, containing $15\frac{3}{4}$ acres, forfeited in the name of Edward McDonald's heirs.

Tract No. 16, containing 39 acres, forfeited in the name of Edward McDonald's heirs.

Tract No. 17, containing 60 acres, forfeited in the name of M. B. Mullins and others.

Tract No. 18, containing 383 acres, forfeited in the name of D. S. and Ada Mullins.

Tract No. 19, containing 50 acres, forfeited in the name of Altamah Runyon.

Tract No. 20, containing lots Nos. 14, 15, and 16 in the town of Aracome, forfeited in the name of H. K. Shumate.

Tract No. 21, containing 370 acres, forfeited in the name of H. K. Shumate.

Tract No. 22, containing 25 acres, and forfeited in the name of W. F. Butcher.

Tract No. 23, containing 30 acres, and forfeited in the name of W. F. Butcher.

Tract No. 24, containing 15 acres, and forfeited in the name of David Dingess's heirs.

Tract No. 25, containing 80 acres, forfeited in the name of E. C. Duty.

Tract No. 26, containing 15 acres and forfeited in the name of J. I. Coon.

Tract No. 27, containing 32 acres and forfeited in the name of Sophia Lambert's heirs.

Tract No. 28, containing 25 acres and forfeited in the name of Sophia Lambert's heirs.

Tract No. 29, containing 68 acres, and forfeited in the name of Hollie Bryant.

Tract No. 30, containing 77 acres, and forfeited in the name of Lelia Dingess.

Tract No. 31, containing 15 acres and forfeited in the name of J. I. Coon.

Tract No. 32, containing 75 acres, and forfeited in the name of William Lilly's heirs.

Tract No. 33, containing 36 acres, and forfeited in the name of Anthony Lawson's heirs.

Tract No. 34, containing 190 acres, forfeited in the name of John Messer.

Tract No. 35, containing 150 acres, and forfeited in the name of B. S. Workman.

Tract No. 36, containing 75 acres and forfeited in the name of B. S. Workman.

Tract No. 37, containing 54 acres and forfeited in the name of M. B. Mullins.

Tract No. 38, containing part of lot No. 6 in the town of Aracoma and forfeited in the name of J. R. Perry's heirs.

Tract No. 39, containing 75 acres forfeited in the name of Lydia Brown.

Tract No. 40, containing 460 acres being part of 920 acres part of Rutter & Etting survey, forfeited in the name of Catherine Bumgardner, being the same 460 acres *refer-ed* to here in the report as tract No. 1.

Tract No. 41, containing 460 acres, being part of 920 acres part of Rutter & *Et-ing* survey and forfeited in the name of W. R. Hughes, and being the same 460 acres *refer-ed* to herein this report as Tract No. 4.

Tract No. 42, containing 20,000 acres, and forfeited in the name of Alvin Irwin and Marie E. Hoyt.

Tract No. 43, containing 20,000 acres, forfeited in the name of Emma J. Pomeroy, and being the same tract forfeited for the year 1893 in the name of Alvin Irwin and Marie E. Hoyt and described in this report as Tract No. 42.

Your commissioner would further report that each of the above and foregoing described tracts of lands have been forfeited for the non-payment of taxes thereon; and are now liable to be sold in the manner prescribed by law;

and he prays that he may be authorized by decree to proceed against the same in the manner prescribed by law.

Respectfully submitted,

JOSEPH W. HINCHMAN.

Commissioner of School Lands for Logan County.

Endorsed on the back "Filed May 3, 1897, T. C. Whited, Clerk." Recorded in Chancery Order Book "G" page 52.

At a Circuit Court continued and Held for Logan County, at the Court House thereof on Monday the 3rd Day of May, 1897.

The following decree was made and entered in words and figures as follows, to-wit:

This day Joseph W. Hinchman, Commissioner of School Lands of this county tendered his report to the court *showing* in said report the forfeiture of 43 tracts of land situate in the county of Logan numbered in said report from 1 to 43 for the non-payment of taxes due thereon. It is therefore adjudged, ordered and decreed that said report be filed and recorded in full upon the Chancery Order Book of this Court.

It is further adjudged, ordered and decreed that the said Joseph W. Hinchman, Commissioner of School Lands of this county be and he is hereby authorized and directed to institute and prosecute in the Circuit Court of this County suits in Chancery in the name of the State of West Virginia for the sale of the said tracts of land in the manner prescribed by Chapter 24 of the Acts of the Legislature of this State for the year 1893.

The bill of Complaint of the State of West Virginia, Plaintiff against Jesse R. Irwin, Harris Hoyt, Charles F. Thomas, Mary Irwin, Virginia Irwin, Ethel Irwin, Clara Irwin, Alvin Irwin, Emma Pomeroy, J. B. Wilkinson and Marie Hoyt, Defendants Filed in the Circuit Court of Logan County, West Virginia.

To the Hon. E. S. Doolittle, Judge of said Court:

The above named plaintiff complains and says that the sheriff of Logan County, West Virginia, in the month of December, 1895, in pursuance of the statute in such cases made and provided, sold a large number of

tracts and lots of land situate in said county for the non-payment of the State, County and District tax then due and unpaid upon said lands, at which sale said sheriff purchased said lands for the plaintiff in the mode prescribed by law, which sale was duly reported by said sheriff to the Clerk of the County Court of said County, and by him duly reported to the Auditor of said State who after the expiration of twelve months next succeeding the sale of said real estate, has duly certified a list of said real estate to the commissioner of school lands for said Logan County who has reported the same to the Circuit Court of said county of Logan on the 3rd day of May, 1897, as being liable to be sold for the benefit of the school fund of the state, and that upon the filing of said report by J. W. Hinchman, Commissioner of school lands for said county the court made and caused to be entered a decree directing said commissioner of school lands to institute and prosecute all necessary suits in the name of the State of West Virginia as required by law, for the sale of each and all of said tracts and lots of land so reported by said Commissioner of school lands, which is situate in the county of Logan, State of West Virginia.

The plaintiff further alleges, that by reason of the purchase by the State of the various tracts and lots of land mentioned in said report situate in said county and the failure of the former owner thereof to redeem the same within the time required and provided by law, the title thereof has become absolutely forfeited to and completely vested in the plaintiff and that said real-estate nor any part thereof has been redeemed from said forfeiture, nor has the same or any part thereof been otherwise disposed of, but that the title to the tract and parcel of real estate hereinafter set out, is still vested in and is the absolute property of the plaintiff, and is liable to be sold for the benefit of the school fund.

Plaintiff would state and here charge that the following is a part of the tracts of land forfeited as shown by said report viz.

Tract No. 42, containing 20,000 acres forfeited in the name of Alvin Irwin and defendant Marie E. Hoyt for the non-payment of the tax due therein for the year 1893, Plaintiff would further state that since said forfeiture, the

said Alvin Irwin, has departed this life intestate, and leaving as his heirs surviving the defendants Mary Irwin, his widow, and his children *Virgin*- Irwin, Ethel Irwin, Clara Irwin, and Alvin Irwin, the last four of whom are infants, who are now the equitable owners of whatever interest the said decedent had in said lands.

Also tract No. 43 in said report containing 20,000 acres and forfeited in the name of Emma J. Pomeroy for the non-payment of taxes due thereon for the year 1894.

Plaintiff would further charge that the defendant *Jess*-R. Irwin, Harris Hoyt, Charles F. Thomas and J. B. Wilkinson are each claiming an interest to or in certain *pro*-*tions* of said land and assert the fact to be that they have some kind of title to portions of said land, and plaintiff here charges that whatever title they or either of them had, if any, has been forfeited to the State as above stated, and that neither of them has paid taxes upon said two tracts of land or any part thereof since said forfeiture.

Plaintiff further alleges that all persons known to the plaintiff to be former owners of the two tracts of land above set out and herein proceeded against, - at the time of the *fore**fiture* thereof and all persons in whose name the same was forfeited, so far as known to the plaintiff, as well as all persons claiming title to or an interest in said lands so far as known to plaintiff have been made parties defendants herein.

The plaintiff therefore prays, that all proper orders and decrees be made and entered herein by your Honor's Court, and that this cause be *refer*-*ed* to one of the Commissioners in Chancery of your Honor's Court, with instruction to report upon the tract of land herein named as far as required by law, and that the real-estate complained of be sold for the benefit of the school fund upon such terms and conditions as the court may direct, and that upon a final hearing of this cause, the plaintiff may be afforded such other, further and general relief as the court may see fit to grant and as in duty bound it will ever pray, etc.

THE STATE OF WEST VIRGINIA,
By Counsel.

J. S. MARCUM,

J. S. MILLER,

Sol's.

Endorsed on the back: "Bill & Exhibits." "1897 July Rules Bill filed and decree nisi as to adult defendants served. Aug. Rules Bill taken for confessed and cause set for hearing as to adult defendants served.

Summons in Chancery.

State of West Virginia:

To the Sheriff of Logan County, Greeting:

We command you that you summon Jesse R. Irwin, Harris Hoyt, Charles F. Thomas, Mary Irwin, Virginia Irwin, Ethel Irwin, Clara Irwin, Alvin Irwin, Emma Pomeroy and J. B. Wilkinson and Marie Hoyt, if they be found in your bailiwick to appear before the Judge of our Circuit Court for the County of Logan at rules held in the Clerk's office of said court on the first Monday in July next to answer a Bill in Chancery exhibited against them in our *sair* court by the State of West Virginia. And have then there this writ.

Witness T. C. Whited, Clerk of our said Court at the Court House of said County on the 17th day of June, 1897, and in the 34th year of the State.

T. C. WHITED, *Clerk.*

Endorsed on the Back.

"Legal service of the within summons accepted by us, Harris Hoyt, Marie Hoyt, C. F. Thomas Emma Pomeroy, Mary Irwin, by Jesse R. Irwin agent and attorney in fact.

Executed on J. B. Wilkinson June 18th, 1897, by delivering to him an office copy of this summons in Logan County, W. Va., the other defendants not found in my bailiwick, this 18th June, 1897.

J. R. HENDERSON, *S. L. C.*

"Executed by delivering a true office copy of the within summons to Jesse R. Irwin in Mingo County, W. Va. July 1, 1897.

N. W. HAWLEY, *Dup.*
For N. J. KEADLE, *S. M. C.*

75c. fee.

At a Circuit Court Continued and Held for Logan County, at the Court House thereof on Thursday the 4th day of Nov., 1897.

The following decree was made and entered in words and figures as follows, to-wit:

In Chancery.

State of West Virginia,

vs.

Jesse R. Irwin.

This day this cause came on to be heard upon the plaintiff's Bill and the answer of the infant defendants, Harry Irwin, Virginia Irwin, Ethel Irwin, Clara Irwin, and Alvin Irwin, by J. B. Wilkinson their guardian ad litem, with general replication to said answer and it appearing to the Court that the process in this cause had been regularly executed and served upon the defendants Jesse R. Irwin, Harris Hoyt, Charles F. Thomas, Mary Irwin, Emma Pomeroy, J. B. Wilkinson and Marie Hoyt, and the adult defendants having failed to appear or plead and still failing to appear answer or *plea* and upon motion of the plaintiff by its attorney the cause was brought on to be heard, and

The Court after hearing the argument of counsel for the Plaintiff is of opinion to and doth refer this cause to J. E. Peck, Sr., one of the Commissioners in Chancery of this Court with instructions to take, state and report an account showing:

First. Each parcel or tract of land in the plaintiff's bill mentioned, that is liable to sale for the benefit of the school fund, the number of acres there may be in each of said tracts and *it* location.

Second. The amount of taxes due upon each of said tracts with its accrued interest and to what fund belonging.

Third. In whose name the same was forfeited as well as the present owner or claimant of said land.

Fourth. Any other matter that may be deemed pertinent by the said Commissioner or required by any party in interest; and said Commissioner is hereby empowered to have done any surveying that may be necessary to enable him to make his report hereunder but before proceeding to execute the requirements of this decree said Commissioner shall give notice required by section 24 of the Acts of 1893, and

He shall report his proceedings hereunder to the next term of this Court, B. C.

Commissioner's Notice.

In Chancery.

The State of West Virginia,

vs.

Jesse R. Irwin, Harris Hoyt, Marie Hoyt, Charles F. Thomas, Mary Irwin, Emma Pomeroy, Virginia Irwin, Esther Irwin, Clara Irwin, Alwin Irwin and J. B. Wilkinson, Defendants.

The plaintiff and each and all the above named defendants and all of the unknown owners of any part or parcel of the land mentioned in plaintiff's bill in the above styled cause, as one tract of 20,000 acres situate in the north side of Guyan river in Triadelphia District in Logan County, West Virginia, and forfeited in the name of Emma Pomeroy for the non-payment of taxes due thereon for the year 1895.

Also one tract of 20,000 acres forfeited in the name of Alvin Irwin and Marie Hoyt for the taxes of 1893, and situated in said Districts in Logan County, West Virginia, it being the same lands formerly owned by the defendants Jesse R. Irwin, Harris Hoyt, Marie Hoyt, and C. F. Thomas, will take notice that on the 8th day of February, 1898, at Logan Court House in Logan County, West Virginia, I will commence the discharge of my duties under the requirement of the decree of reference in the above entitled cause, a copy of which decree is published with this notice at which time and place you and each of you, can attend and protect and defend any *inter-st* you may have in this land or any of them in question in this suit.

Given under my hand this 29th day of December, 1897.

J. E. PECK, SR.

Commissioner.

Decree in the Above Styled Cause.

That this cause be and the same is *refer-ed* to J. E. Peck, Sr, one of the Commissioners in chancery of this court with instructions to take, state and report an account showing:

First. Each parcel or tract of land in the plaintiff's bill mentioned, that is liable for sale for the school

fund, the number of acres there may be in each of said tracts and its location.

Second. The amount of taxes due upon each of said tracts with the accrued interest and to what fund it belongs.

Third. In whose name the same was forfeited, as well as the present owners or claimant of said lands.

Fourth. Any other matter that may be deemed pertinent by the said commissioner or required by any party in interest and said commissioner is hereby empowered to have done any surveying that may be necessary to enable him to make his report hereunder. But before proceeding to execute the requirements of this decree, said commissioner shall give notice required by section 24, of the Acts of 1893, and he shall report his proceedings to the next term of this court.

State of West Virginia,

Logan County, to wit:

W. A. Brazie, being duly sworn on oath says, that on the 14th day of January, 1898, he posted a copy of the annexed Notice on the front door of the Court House of said County.

W. A. BRAZIE.

Taken, subscribed and sworn to before me in said county on the 21st day of February, 1889.

H. C. RAGLAND,
Notary Public.

I, W. A. Brazie, the publisher of The Logan Banner, a newspaper published in Logan County, West Virginia, do hereby certify that the annexed Notice was duly published in said paper for 4 successive weeks ending on the 3rd day of February, 1898.

Given under my hand this 21st day of February, 1898.

W. A. BRAZIE.

3 Cor. Report.
In Chancery.

State of West Virginia

vs.

Jesse R. Irwin et als.

To the Hon. E. S. Doolittle, Judge of the Circuit Court of
Logan County:

Your commissioner in above entitled cause would respectfully submit the following report, that on the 28th day

of December, he caused a notice to the parties to this suit to be published in the Logan County Banner for four weeks, and also caused a copy of said notice to be posted on the Front door of the Court House of Logan County for the same length of time.

First. Each tract or parcel of land in the plaintiff's bill mentioned, that is liable to sale for the benefit of the school fund the number of acres there may be in each of said tracts and its location. Under this requirement your commissioner would report that in March, 1886, Jesse R. Irwin held a deed from Com'r of school lands W. B. McClure of Wyoming County, W. Va., for 20,000 acres of land situate and lying on East side of Guyandotte river in Triadelphia District, Logan County, West Virginia, all of which was returned delinquent for non-payment of taxes was purchased for the State by the Sheriff of Logan County, has not been redeemed and is therefore forfeited to the State of West Virginia and liable for sale for benefit of the school fund. In 1887 this land was sold for delinquent tax to H. K. Shumate, in 1892 it was placed on the land books of Logan County with four years back taxes and *inter-st* charged of which taxes and interest was paid. In 1886 Jesse R. Irwin deeded $\frac{1}{4}$ undivided *inter-st* to Harris Hoyt, $\frac{1}{4}$ undivided *inter-st* to Alvin Irwin, $\frac{1}{4}$ undivided *inter-st* to C. F. Thomas. In 1887 Alvin Irwin, deeded his $\frac{1}{4}$ undivided *inter-st* to Jesse R. Irwin. In 1893 Jesse R. Irwin, Harris Hoyt, Marie Hoyt, Alvin Irwin and Marie Irwin deeded 20,000 acres to Emma Pomeroy, it was returned delinquent for 1893 in the name of Alvin Irwin and Marie Hoyt. In 1894 returned delinquent in name of Emma Pomeroy as 1600 acres, 4000 acres having been transferred to Mingo County, W. Va., and in 1896 it was dropped from land books of Logan County.

Second. The amount of taxes due upon each of said tracts with the accrued *inter-st* and to which fund it belongs;

Under this requirement I have prepared a table fully showing in whose name lands was returned delinquent amt. of taxes and *inter-st* due to State, State School, County and District for teachers fund, building fund and road fund all of which is sub-joined to this report.

Third. In whose name the same was forfeited as well

as the present owner or claimants of said lands. This land was forfeited for 1886 $\frac{1}{4}$ in name of Harris Hoyt, 1886 $\frac{1}{4}$ in name of Alvin Irwin, 1886, $\frac{1}{4}$ in name of Jesse R. Irwin $\frac{1}{4}$ in name of C. F. Thomas, 1893 the whole 20,000 acres was forfeited 1886, in the name of Alvin Irwin and Marie Hoyt, 1894 the whole amount 20,000 acres in the name of Emma Pomeroy, 1895 16000 acres forfeited in the name of Emma Pomeroy, and for year- 1896 and 1897 it has been dropped from land books of Logan County.

Fourth. Any other matter that may be deemed pertinent by the Commissioner or required by any party in interest and said commissioner is hereby empowered to have any surveying that may be necessary to enable him to make his report hereunder.

Under this requirement your commissioner would report that as neither party required any surveying done he did not deem it necessary as he is advised and believes that the state could only recover on the number of acres deeded by W. B. McClure, Com'r of School Lands of Wyoming County, W. Va., Millard McDonald and Bruce McDonald filed with said Com'r a deed from Jesse R. Irwin et al for certain black walnut and other trees, also their tax receipts on 890 trees paid to the Sheriff of Logan County, both of which are marked Exhibit "A" and filed with this report. Your Commissioner is of the opinion that their remedy against this land would be by redemption.

Respectfully submitted.

J. E. PECK,
Com'r in Ch'y.

Time 40 hours.

Endorsed on Back.

"Filed in Logan County Circuit Court Clerk's Office
April 6th 1898.

T. C. WHITED, *Clerk.*

At a Circuit Court Continued and Held for Logan County at the Court House Thereof on Monday the 1st day of Nov., 1897.

The following decree was made and entered in words and figures as follows to-wit:

In Chancery.

State of West Virginia

vs.

Jesse R. Irwin, et als.

Upon mention of the plaintiff and it appearing to the court that the defendants Harry Irwin, Virginia Irwin, Ethel Irwin, Clara Irwin, and Alvin Irwin, are infants under the age of twenty one years, J. B. Wilkinson is hereby appointed guardian ad litem to defend their *inter-st* in this suit, and thereupon the said J. B. Wilkinson tendered his answer as such guardian ad litem, which is filed by order of the court, to which answer the plaintiff replies generally.

Answer of Guardian ad Litem.

The joint answer of Henry Irwin, Virginia Irwin, Ethel Irwin, Clara Irwin, and Alvin Irwin infant defendants by their guardian ad litem J. B. Wilkinson to a bill of complaint exhibited against them and others in the Circuit Court of Logan County by the State of West Virginia, complainant.

To the Hon. E. S. Doolittle, Judge of Said Court:

These defendants by their said guardian ad litem for answer to said bill say:

That they are infants of tender years and as such wholly incapable of understanding or protecting their interests in this suit and they therefore submit themselves and their rights and *inter-st* to the care and protection of the court and pray that no decree prejudicial to their said rights and *inter-st* be pronounced against them and having fully answered pray to be hence dismissed with their costs &c.

HARRY IRWIN
VIRGINIA IRWIN
ETHEL IRWIN
CLARA IRWIN
ALVIN IRWIN

By J. B. WILKINSON,
Their guardian ad litem.

At a Circuit Court Continued and Held for Logan County at the Court House Thereof on Friday the 29th day of April, 1898.

The following decree was made and entered in words and figures as follows, to-wit:

In Chancery.

The State of West Virginia

vs.

Jesse R. Irwin et al.

This day J. E. Peek one of the commissioners of this Court to whom this cause was referred by a decree rendered in this cause at a former term of this court, tendered and filed his report herein, and thereupon Buren Browning, Edward Browning Thomas Tiller, Bruce McDonald and Millard McDonald *tendered* and asked leave to file their written exceptions to the report of the Commissioner herein to the filing of which said exceptions the plaintiff by her attorney objects which objections are overruled and said exceptions allowed to be filed, and thereupon the State by her attorney moved the court to strike from the file in this cause said exceptions so filed as aforesaid by the said Bruce and Millard McDonald upon the ground that they were not parties to this suit which said motion the court sustained and set said exceptions taken by Buren Browning Edward Browning and Thomas Tiller down for argument and said exceptions having been fully argued by counsel and maturely considered by the court, the Court is of opinion that said exceptions should be overruled. It is therefore adjudged, ordered and decreed that said exceptions *by* and the same are hereby overruled, and there being no further exceptions or objections the said report and the same having been seen and inspected by the court and found to be correct. It is further adjudged, ordered and decreed, that the said report of said Commissioner be and the same is hereby confirmed and approved.

Thereupon Bruce McDonald and Millard McDonald tendered their petition asking to be made party defendant herein and asked leave to file the same which is accordingly done and to be permitted to give bond and remove certain timber cut from the lands sought to be sold herein which was cut from Big Spring and Green Branches of Huffs creek by Levi Stephens Jr. and the said Bruce McDonald and Millard McDonald are made party de-

defendants herein according to the prayer of their petition. And now this day this cause came on to be further heard upon the plaintiffs bill and the exhibits filed therewith upon the answer of the infant defendants by J. B. Wilkinson, guardian, ad litem, with general replication thereto, upon the report of Commissioner J. E. Peck heretofore filed herein, the petition of Bruce McDonald and Millard McDonald filed herein with general replication thereto together with all the orders and decrees heretofore had and made herein and were argued by counsel. Upon consideration whereof the court is of opinion that the lands herein sought to be sold have become forfeited to and are now vested in the State of West Virginia and liable to sale for the benefit of the school fund, and that at the date of such forfeiture Alvin Irwin and Marie Hoyt had title thereto superior to all other claimants and that Jesse R. Irwin grantee of Alvin Irwin and Emma I. Pomeroy are entitled to any excess for which the lands may be sold over and above the taxes *inter-st* and costs.

It further appearing from the report of commissioner Peck that the taxes and interest charged and *charg-able* on said land up to and including the year 1897 amounts to \$7955.19 the whole of which is yet due and unpaid. It is therefore adjudged, ordered and decreed that unless the said Jesse R. Irwin and Emma I. Pomeroy or some one for them shall within thirty days from the rising of this court pay off the whole of said taxes, interest and costs including a statute fee of \$20.00 then it shall be the duty of J. W. Hinchman, Commissioner of School Lands of this county to sell the lands in the plaintiffs bill mentioned at public auction at the front door of the Court House of this county after first publishing notice thereof in the Logan Banner for at least four weeks prior to the day of sale and posting a copy of such notice at the front door of the Court House of this county, such sale to be made upon the following terms sufficient cash on day of sale to pay costs of suit and expenses of sale and the residue in six and twelve months the purchaser giving notes with good security for deferred payments, and the legal title to be retained as additional security.

It is further ordered that the defendants Bruce

and Millard McDonald be and are hereby permitted to remove the timber heretofore cut from the Big Spring and Green Branches of Huffs Creek first giving bond for the value thereof in the penalty of \$500.00 with security to be approved by the clerk of this court conditioned to pay to the State the full value of said timber should it hereafter appear that said timber does not belong to them. And it further appearing to the court from the petition of Bruce and Millard McDonald that it is necessary to refer this cause to one of the commissioners of this court to ascertain and report as to the title and ownership of the timber mentioned in said petition. It is further adjudged, and decreed that this cause be referred to J. E. Peck one of the Commissioners of this court to ascertain and report 1st; what title if any the said Bruce McDonald and Millard McDonald have to the timber set out in this petition. 2nd; the value of timber removed by them under this decree, and report his proceedings hereunder to the next term of this court, but before proceeding to act hereunder said commissioner shall give to J. W. Hinchman Com'r of School lands of this county and Bruce and Millard McDonald ten days' notice in writing of the time and place of his sittings.

Commisisoner's Sale of Valuable Real Estate.

By virtue of a decree of the Circuit Court of Logan County rendered at the April term 1898 thereof in the chancery cause of the State of West Virginia vs. Jesse R. Irwin et al., the undersigned Commissioner of School lands for Logan County will proceed to sell at the front door of the court house of Logan County, West Virginia, by way of public auction to the highest bidder, on the 17th day of October, 1898 the following described real-estate in said county, to-wit:

All that 20,000 acres of land not overlapped by what is known as the DeWitt Clinton Survey, situate in what was known as Triadelphia district, Logan County, West Virginia, but now Triadelphia Logan County, and Stafford district and Magnolia District Mingo County, West Virginia, which said 20,000 acres was forfeited to the State for the non-payment of the taxes due thereon for the year 1893, in the name of Alvin Irwin, et al. About

1000 acres of said 20,000 acres is overlapped by said De-Witt Clinton Survey. Said 20,000 acres is known as the Jesse R. Irwin lands. Said lands are wild lands well timbered and underlaid with excellent coal.

Terms of sale, cash enough in hand paid on day of sale to satisfy all costs of suit and expenses of *sale* for the balance a credit of six and twelve *month* will be given the purchaser executing bond with approved personal security, bearing interest from day of sale for the deferred installments of purchase money, and retaining legal title as additional security.

J. W. HINCHMAN,

Commissioner of School Lands.

June 21st/1898.

State of West Virginia,

Logan County, To wit:

W. A. Brazie, being duly sworn, on oath says that on the 9th day of September, 1898, he posted a copy of the annexed Notice on the front door of the Court House of said County.

W. A. BRAZIE.

Taken, subscribed to before me in said county on the 17th day of October, 1898.

.....
Notary Public.

I, W. A. Brazie, the Publisher of The Logan County Banner a newspaper published in Logan County, West Virginia, do hereby certify that the annexed Notice was duly published in said paper 4 *seccessive* weeks ending on the 13th day of October, 1898.

Given under my hand this 13th day of October, 1898.

W. A. BRAZIE.

Printer's fee, \$9.25.

In Chancery.

The State of West Virginia

vs.

Jesse R. Irwin, et al.

To the Hon. E. S. Doolittle, Judge of the Circuit Court of Logan County:

The undersigned commissioner of school lands of Logan

County would report that after he duly advertised the sale of the lands and real estate mentioned in the bill and proceedings herein in the manner and form directed by the decree of sale *dendred* herein at the April term 1898 of the Circuit Court of said County.

Your Commissioner on the 18th day of October, 1896 at the front door of the court house of said county on a court day sold at public auction the following real estate in the bill and proceedings in said cause mentioned to-wit: Being all the real estate in the bill and proceedings mentioned and described situate, lying and being in Tridelpia District in the County and Stafford District in Mingo County, West Virginia, except that *protion* of said real estate if any included in the DeWitt Clinton Survey, and all timber standing and being on said lands formerly sold to and branded by the Little Kanawha Lumber Co., a corporation.

That at said sale W. H. Stoddard and Amos C. Hall being the highest bidders therefor became the purchaser thereof at the price of \$3000.

That said purchasers have complied with the terms of sale by paying to your commissioner the sum of \$446.29 costs of suit and expenses of sale and said purchasers desiring to anticipate the payment of the residue due upon purchase to-wit: the sum of \$2553.71 had *dlievered* to your said commissioner a draft for the said sum together with the *inter-st* thereon for the sum of \$2566.47 payable at the Merchants National Bank of Albany, N. Y., and drawn upon O. L. Snyder said draft being due and payable within 30 days after date thereof which is filed with and made a part of this report.

Your commissioner deeming said amount a fair and adequate price for said real-estate *recommned* a confirmation of said sale.

Respectfully submitted, the *the* 2nd day of November, 1898.

J. W. HINCHMAN,
*Commissioner of School Lands for Logan
County, West Virginia.*

Endorsed on the back "filed in open court Nov. 3rd, 1898. T. C. Whited, Clerk."

At a Circuit Court continued and held for Logan County, at the Court House thereof on Thursday the 3rd day of November, 1898.

The following decree was made and entered in words and figures as follows, to-wit:

In Chancery.

The State of West Virginia

vs.

Jesse R. Irwin et als.

This day J. W. Hinchman, Commissioner of School lands of this county tendered and filed his report that said commissioner after having duly advertised the real estate directed to be sold by the decree of sale herein in the manner therein prescribed on the 18th day of October 1898 at the *front* door of the court house of this county, at public auction, sold the following real estate in the bill and proceedings mentioned situate in this and Mingo Counties except such parts thereof if any as may be included in the DeWitt Clinton survey, and such timber standing on such lands as were heretofore sold to and branded by the Little Kanawha Lumber Company and except such lands within the exterior boundary of the lands herein sold the legal title whereof is protected under the constitution and laws of this state.

That W. H. Stoddard and Amos C. Hall being the highest bidder *therefore* became the purchasers thereof at the price of \$3000.00. That said purchasers complied with the terms of sale by paying \$446.29 costs of suit and expenses of sale, cash in hand, and for the residue of the purchase money executed their draft for \$2566.47 payable at 30 days sight and drawn on O. L. Snyder as set out in said report of sale said purchasers not desiring to avail *themselves* of the credit allowed by said decree. And there being no exceptions or objections to said report the same together with said sale is in all things *approved* and confirmed.

It is therefore adjudged, ordered and decreed that said Commissioner out of said cash payment pay the costs of suit and expenses of sale to the parties thereto entitled taking proper receipts therefor; and said commissioner is directed to withdraw said purchase money drafts and col-

lect the same bring the proceeds when collected into court to be distribution by order of the court.

And when said purchase money shall have been fully paid it shall be the duty of J. B. Wilkinson who is hereby appointed a Special Commissioner for the purpose to make, acknowledge and deliver to the said purchasers or to such person as they may direct a proper and apt deed to the real estate sold herein to said purchasers as aforesaid, for which said Special Commissioner shall be allowed a fee of \$25.00 to be taxed as costs of suit. Said Commissioner of School lands is required to report his proceedings hereunder to this court. The said Special Commissioner in making said deed shall be guided in making the same according to the exceptions as to the lands and timber above mentioned.

It is further adjudged, ordered and decreed that this decree shall not *effect* the rights on Millard and Bruce McDonald to the timber claimed by them in their petition filed in this cause and as to such rights this cause is recommitted to J. E. Peck one of the commissioners of this court with instructions to report what *titled* if any the said Bruce and Millard McDonald have to said timber claimed by them as aforesaid and the name and character of such title.

But before proceeding to act under this decree said Commissioner Peck is required to give to said Bruce and Millard McDonald or their attorney H. C. Ragland and to the said W. H. Stoddard and Amos C. Hall or *their* attorney at least 10 days notice of the time and place of his sittings hereunder and report his proceedings to the next term of this court retaining his report the evidence upon which the same is based.

To the introduction and consideration of which several instruments constituting the record of said cause of State of West Virginia vs. Jesse R. Irwin and others the defendants objected, upon the ground that the same were incompetent and immaterial, the bill in said cause not describing or identifying or furnishing the means of identifying any land, and not being sufficient as a basis for any of the proceedings had in said cause; and because the defendants to this action were not parties to said suit of State vs. Irwin et als., and to allow the said decrees and proceedings to affect any of the rights

of said defendants would be to deprive them of property by the State of West Virginia without due process of law and in contravention of Section 1 of Article 14 of the Amendments of the Constitution of the United States, and for this court to give effect to said decrees and proceedings against these defendants by holding the same to be an adjudication affecting their rights, or otherwise, would deprive these defendants of property without due process of law in contravention of Article 5 of the Amendments of the Constitution of the United States; and because said proceedings were further immaterial for the reason that it does not appear that they affect or relate to the land in controversy in this cause. Which objection the court overruled and permitted said report, decrees, bill and proceedings to be received and read in evidence; to which action of the court in overruling defendants' said objection and in permitting said papers to be received and read in evidence, the defendants, by counsel, then and there excepted and prayed that said exception saved to them and be made part of the record, which is accordingly done. And this is defendants' Second Exception.

EXCEPTION NO. 3.

Be it further remembered that after the introduction in evidence of the papers set out in Exceptions No. 1 and No. 2, the plaintiff, further to maintain the issues on its part, offered in evidence an instrument of writing dated Nov. 12, 1898, purporting to be a deed from J. B. Wilkinson; special commissioner to H. W. Stoddard and Amos C. Hall, which is referred in the stipulation aforesaid as "Exhibit No. 3" and is in words and figures as follows, to-wit:

"WILKINSON DEED."

(Exhibit "No. 3.")

This deed, made this 12th day of November, 1898, between J. B. Wilkinson, Special Commissioner, of the first part, and W. H. Stoddard and Amos C. Hall of the second part.

Whereas, Joseph W. Hinchman, Commissioner of School Lands of Logan County, West Virginia, in pursuance of

the authority vested in him by a decree of the Circuit Court of the County of Logan, made on the 29th day of April, 1898, in a suit in chancery therein pending in which the State of West Virginia was plaintiff and Jesse R. Irwin et al., were defendants did sell the real estate hereinafter mentioned and conveyed according to the terms and conditions required by said decree at which sale the said W. H. Stoddard and Amos C. Hall became the purchasers for the *ssum* of Three Thousand Dollars (\$3000.00); the real estate so sold and purchased as aforesaid, being all the portion of a 40,000 acre survey situate in the County of Logan and Mingo which said 480,000 acre survey was conveyed to Jesse R. Irwin from W. B. McClure, Commissioner of School Lands for the county of Wyoming, by deed dated March 25th, 1886, now of record in the Clerk's Office of the County Court of said County of Logan, in Deed Book "I" pages 393, 394, and 395.

And whereas, the said Court by a subsequent decree made in the case on the 3rd day of November, 1898, confirmed the said sale and directed a deed for the said real estate, sold and purchased as aforesaid, to be made to the said W. H. Stoddard and Amos C. Hall, by the said J. B. Wilkinson, who was appointed a Special Commissioner for the purpose by said last named decree.

And Whereas, by the terms of the last mentioned decree there was excepted from the sale made by the said J. W. Hinchman, Commissioner of School Lands as aforesaid, to the said W. H. Stoddard and Amos C. Hall, such parts, if any, of the said real estate in the said counties of Logan and Mingo, as may be included in the DeWitt Clinton Survey, and such timber standing on such land as were heretofore sold to and branded by the Little Kanawha Lumber Company, and except such lands that lie in the exterior boundary of the lands sold as aforesaid, the legal title whereto is protected under the Constitution and Laws of the State of West Virginia, and the said Special Commissioner in making said deed, was required to be guided by the decree last named as aforesaid, according to the exception as to the lands and timber above mentioned. Now, therefore,

This deed witnesseth, that the said J. B. Wilkinson, Special Commissioner as aforesaid, doth grant unto the

said W. H. Stoddard and Amos C. Hall all of that portion of the said 480,000 acre survey situate, lying and being in the said Counties of Logan and Mingo, subject to the exceptions mentioned in said last decree as to the timber and lands therein expressly mentioned.

The said 480,000 acre survey is bounded and described as follows, as contained in the deed above mentioned from W. B. McClure, Commissioner of School Lands, to the said Jesse R. Irwin, to-wit: beginning at two poplars, a walnut and Sugar Tree on the north side of the main fork of Tug River, a branch of Sandy River, a corner of a survey of 500,000 acres of one Nicholas, and one of 150,000 acres of David Patterson, and with a line of the latter S. 53 W. 25, 60 poles crossing said river to three white oaks by a branch of said river, thence leaving the same N. 25 W. 880 poles to five white oaks, a corner to a survey of 300,000 acres made for said Nicholas, and with the line thereof N 35 W. 1750 poles, running two and a half miles to said river, and down the same to five chestnut trees and double poplar on the bank of same, a small distance below the mouth of Elkhorn Creek, N. 10 W. 1600 poles, leaving the river and crossing the ridge between the same and Brown's Creek a branch of said river, and extending along a spur of the dividing ridge to five chestnut trees on the top of the same at the place generally used for crossing from the mouth of Brown's Creek of Tug River to Indian Creek, a branch of Guyandotte being a corner of another survey made for said Nicholas and Jacob Kenney of three hundred and twenty thousand acres, and with the lines of the same and leaving the former N. 65 W. 3200 poles, along the said ridge some of the *spur* thereof and crossing the same to double chestnut tree and a black oak and sourwood on the top thereof, S. 50 W. 3940 poles along said ridge some distance and leaving the top of same *an-* crossing some of the *spur* thereof chiefly on the south side and crossing some of the waters, of Tug River to a lynn and three chestnut trees in a low gap of the same, nearly opposite to the mouth of said river where it empties into Sandy River, N 25 W 880 poles leaving said ridge and crossing some small branches of the Guyandotte to two small poplars and two chestnut trees near branch of said river, thence leaving the lines of said survey N

6800 poles, crossing Laurel Creek and several branches of the same, the dividing ridge between said Creek and Huff or Cane Creek, and crossing the last mentioned Creek a small distance above the mouth to three Sugar trees and a Buckeye by a small branch of Guyandotte River, thence N 85 E. 10050 poles crossing Guyandotte River and several branches thereof to a line of a survey of 500,000 acres made for Nicholas and with same S. 9700 poles crossing Guyandotte River, Bronson's Fork and Indian Creek to the beginning, supposed to contain 20,000 acres, more or less, of the land hereby conveyed. It being expressly understood that no portion of the said 480,000 acre survey situate outside of the said Counties of Logan and Mingo is intended to be conveyed hereby, and only that portion of said survey lying within said Counties of Logan and Mingo, is intended to be conveyed by this deed; and the conveyance of the portion of the said survey so situate in the said Counties of Logan and Mingo is made subject to the exceptions contained in the said decree confirming the said sale to the said W. H. Stoddard and Amos C. Hall.

Witness the following signature and seal.

J. B. WILKINSON, (Seal).
Special Commissioner.

\$3.00 in stamps.

State of West Virginia,

County of Logan, To wit:

I, J. Cary Alderson, a Notary Public in and for the county and state aforesaid, do certify that J. B. Wilkinson Special Commissioner, whose name is signed to the writing above, bearing date on the 12th day of November, 1898, has this day acknowledged the same before me in my said County.

Given under my hand this the 12th day of November, 1898.

J. CARY ALDERSON,
Notary Public.

West Virginia:

In Logan County Court Clerk's Office, January 20th, 1899.

The foregoing deed was this day duly admitted to record in my office.

J. CARY ALDERSON, *Deputy*
For S. S. ALTIZER, *Clerk*.

To the admission of which deed in evidence the defendants objected, upon the ground that the same was incompetent, not being based upon sufficient proceedings, and irrelevant, in that it did not appear to embrace the land claimed in plaintiff's declaration, but excluded and excepted the same therefrom; which objection the court overruled and admitted said deed in evidence and permitted the same to be read to the jury; which action of the court, in admitting said deed to be read in evidence, the defendants, by counsel, then and there excepted and prayed that said exception be saved to them, which was accordingly done. And this is defendants' Third Exception.

EXCEPTION NO. 4.

Be it further remembered that after the reception in evidence of the papers hereinbefore set out and referred to, the plaintiff, further to maintain the issues on its part, offered in evidence two certificates of the auditor of West Virginia, being "Exhibits No. 4 and 5", referred to in said stipulation, and which are in words and figures as follows, to-wit:

EXHIBIT NO. 4.

State of West Virginia,

Auditor's Office, City of Charleston, To-Wit:

I, J. S. Darst, Auditor of the State of West Virginia, do hereby certify that I have examined the Land Books of Logan County, West Virginia, and other records on file in this office, and find:

That for the year 1899 W. H. Stoddard and Amos C. Hall had entered upon the Land Books of said County, and were charged with taxes thereon an estate in fee simple 16,000 acres. Description of the land "Guyan River and Branches," and in the column from whom, when and how

the owner derived title marked "Transferred from the Commissioner of School Lands."

That for the years 1900 and 1901 the said W. H. Stoddard and Amos C. Hall had entered upon the Land Books, and were charged with taxes upon said 16,000 acres of land described as above stated.

That for the year 1902 said tract of land was not charged upon said Land Books in the names of said Stoddard and Hall.

That for the year 1903 said W. H. Stoddard and Amos C. Hall had entered upon the Land Books, and were charged with taxes upon said 16,000 acres in fee simple, and that for this year said land was entered with the remark "Re-entered with one year's back taxes and interest", and that said back taxes for the year 1902 was entered upon the Land Books and charged in this 1903 assessment.

That for the year 1904 Henry Patton, Trustee, had entered upon the Land Books and was charged with taxes with an estate in fee simple this 16,000 acres of land, Description "Guyan River and Creeks", and in the *column* from whom and how the party derived title marked "From Stoddard and Hall."

For the year 1905 Henry Patton, Trustee, had entered upon the Land Books and was charged with taxes an estate in fee simple, 6,151.2 acres. Description "Guyan River and Branches", and in the column from whom and how party derived title marked "9,848.8 acres, conveyed to M. B. Mullins."

That for the year 1905 M. B. Mullins had entered upon the Land Books and was charged with taxes thereon 4,684.8 acres. Description "Guyan River and Creek," and in the column from whom and how party derived title marked "*Transferred* from Henry Patton, Trustee."

That for the year 1905 Henry Newberry and J. A. Collins had entered upon the Land Books and were charged with taxes an estate in fee simple 5,200 acres. Description Guyan River and Creeks, and in the column from whom and how party derived title marked "Transferred from M. B. Mullins and wife."

That for the year 1906 Henry Patton, Trustee, had entered upon the Land Books and was *charges* with taxes an estate in fee simple 5,484.2 acres. Description "Guyan

River and Branches", and in the column from whom and how party derived title marked "676 acres conveyed to Naaman Jackson, Trustee".

That for the year 1906 M. B. Mullins had entered upon the Land Books and was charged taxes an estate in fee simple 4,648.8 acres.

Description "Guyan River and Creek".

That for the year 1906 Harmon Newberry and J. A. Collins had entered upon the Land Books and were charged with taxes an estate in fee simple 5,200 acres. Description "Guvan River and Creek".

That for the year 1907 U. B. Buskirk, Trustee, had entered upon the Land Books and was charged with taxes an estate in fee simple 4,648.8 acres. Description "Guyan River & Branches", and in the column from whom and how party derived title marked "From M. A. Mullins & wife."

That for the year 1907 Harmon Newberry and J. A. Collins had entered upon the Land Books and was charged with taxes thereon an estate in fee simple 5,200 acres, description, "Guvan River & Branches".

That for the year 1907 Henry Patton, Trustee, had entered upon the Land Pooks and was charged with taxes thereon an estate in fee simple 5,484.2 acres. Description "Guyan River and Branches.

That for the year 1908 U. B. Buskirk, Trustee, H. Newberry and J. A. Collins and Henry Patton, each had the same assessment as for the year 1907.

That for the year 1909 U. B. Buskirk, Trustee, had entered upon the Land Books and was charged with taxes thereon 4,668 acres. Description "Guyan River and Franches". That H. Newberry and J. A. Collins and A. R. Wilson had entered upon the land books and were charged with taxes thereon an estate in fee simple 5,200 acres. Description "Guyan River and Branches".

That for the year 1909 Henry Patton, Trustee, had entered upon the Land Books and was charged with taxes thereon an estate in fee simple 5,484.2 acres. Description "Guvan River and Branches".

That for the year 1910 U. B. Buskirk, Trustee, had entered upon the Land Books and was charged with taxes

thereon an estate in fee simple 4,668 acres. Description "Guyan River & Brs."

That for the year 1910 Buffalo Coal & Coke Company had entered upon the Land Books and was charged with taxes thereon 8,486.8 acres. Description "Right Side of Buffalo Cr. Going up."

That for the year 1910 H. Newberry, A. J. Collins and A. R. Wilson had entered upon the Land Books and were charged with taxes thereon an estate in fee simple 5,200 acres. Description "Guyan River & Branches."

That for the year 1911 Buffalo Coal & Coke Company had entered upon the Land Books and was charged with taxes thereon an estate in fee simple 8,484.8 acres. Description "Right Side Buffalo Creek".

That for the year 1911 the Elk Creek Coal Land Company had entered upon the Land Books and was charged with taxes thereon an estate in fee simple the following boundaries, to-wit: 1552 acres; 203 acres; 2 acres; 108 and 3 acres. Description "Elk Creek."

That for the year 1911 H. Newberry, A. J. Collins and A. R. Wilson had entered upon the Land Books and were charged with taxes thereon 5,200 acres. Description "Guyan River and Branches."

That for the years 1912 and 1913 the said Elk Creek Coal Land Company, and the said H. Newberry, A. J. Collins and A. R. Wilson were assessed with the same land as for the year 1911.

That for the year 1912 the Hector Coal Land Company had entered upon the Land Books and was charged with taxes thereon an estate in fee simple 9,217.27 acres. Description "Buffalo and Huff Creek; errors corrected by B. of R. E."

That for the year 1913 the Buffalo Creek Coal & Coke Company had entered upon the Land Books and was charged with taxes thereon an estate in fee simple the following acreage: 1502 acres; 512 acres; 201 acres; 1052.66 acres; 1259.78 acres; 1139.26 acres and 917.77 acres. Description on "Buffalo Creek", and in the column from whom and how party derived title marked "Deed from Hector Coal Company."

That for the year 1913 the Hector Coal Land Com-

pany had entered upon the Land Books and was charged with taxes thereon an estate in fee simple 2,248.59 acres.

Description "Buffalo and Huff's Creek".

All of the above assessments, entries for taxation and charges with taxes being made upon the Land Books for the District of Triadelphia, and County of Logan, State of West Virginia, now upon file in my office.

I do further certify that the taxes *charge* upon the above entries and assessments have all been paid, and that no delinquencies appear against said land, except as follows, to-wit:

That the said 16,000 acres of assessed as aforesaid to W. H. Stoddard and Amos C. Hall was delinquent for the years 1899, 1900 and 1901.

That the 5,484.2 acres assessed in the name of Henry Patton, Trustee, were delinquent for the years 1906, 1907, 1908 and 1909.

That the taxes for which said land was delinquent in the years 1899 and 1900 were paid at this office, together with the interest thereon, and said land redeemed at this office on the 18th day of December, 1902.

And that the taxes for which said 16,000 acres of land was delinquent in the *yar* 1901, were paid and said land redeemed at this office December 18, 1902.

That the taxes charged against said land in the name of Henry Patton, Trustee, and for which it was delinquent in the year 1906 were paid in this office, together with interest and penalties thereon and said land redeemed on the 13th day of December, 1909.

That for the delinquency for the year 1907 the taxes, interest and penalties thereon were paid at this office and said land redeemed on December 8, 1910.

That for the taxes for which said land was delinquent in the years 1908 and 1909 the taxes, interest and penalties were paid at this office and said land redeemed on March 21, 1911.

Given under my hand and Official Seal this 12th day of August, 1914.

J. S. DARST,

Auditor of State of West Virginia.

Auditor's Office

(Seal)

State of West Virginia.

EXHIBIT NO. 5

State of West Virginia,

Auditor's Office, City of Charleston, To-wit:

I, J. S. Darst, Auditor of the State of West Virginia, do hereby certify that I have examined the Land Books of Logan County, West Virginia, for the District of Triadelphia, in said Logan County, and I find and do now certify that John W. Hall, and any of the following mentioned persons as his heirs, either in their name, or by the description of John W. Hall's heirs, to-wit:—Barbara V. Hall, Edwin L. Hall, John W. Hall, Cora S. Hall, William P. Hall, Anna Hall, Frank Hall, Gladys T. Hall, William Haddington, Nancy C. Haddington, have not been assessed or had entered upon the Land Books, of Triadelphia District, Logan County, West Virginia, or been charged with taxes upon the Land Books of Triadelphia District, Logan County, West Virginia, with any land for the following years, to-wit: 1889, 1890, 1891, 1892, 1893, 1894, 1895, 1896, 1897, 1898, 1899, 1900, 1901, 1902, 1903, 1904, 1905, 1906, 1907, 1908, 1909, 1910, 1911, 1912, 1913.

And I do further certify that C. F. Thomas or Charles F. Thomas has not been assessed with any land in Triadelphia District, Logan County, West Virginia, for the following years, to-wit: From 1889, 1890, 1891, 1892, 1893, 1894, 1895, 1896, 1897, 1898, 1899, 1900, 1901, 1902, 1903, 1904, 1905, 1906, 1907, 1908, 1909, 1910, 1911, to 1912.

And I do further certify that J. B. Ellison, Trustee, J. B. Ellison, I. P. Baer, Trustee, I. P. Baer, Edwin L. Hall, Trustee, H. C. Jones, and H. C. Jones Executor of the last

Will of Hannah C. Jones, or either of *the*, were not assessed upon the Land Books of Triadelphia District, Logan County, West Virginia, with any land for the years 1911, 1912 and 1913, except that for the year 1913; I. P. Baer and J. B. Ellison, Trustee, are assessed with 800 acres of land "Buffalo and Huffs Creek".

And I do further certify that Naaman Jackson, or Naaman Jackson, Trustee, was not assessed with any lands in Triadelphia District, Logan County, West Virginia, for the following years, to-wit: 1889, 1890, 1891, 1892, 1893, 1894, 1895, 1896, 1897, 1898, 1899, 1900, 1901, 1902, 1903, 1904, 1905.

And I do further certify that James Doliver Brown or James D. Brown was not assessed with any lands in Triadelphia District, Logan County, West Virginia, for either of the following years, to-wit:

1900, 1901, 1902, 1903, 1904, 1905, 1906, 1907, 1908, 1909, 1910, 1911, 1912, and that for the year 1913 said James D. Brown was assessed with fourteen (14) acres, and in the column from whom and how party derived title was marked "From Claypool Est."

Given under my hand and Official Seal this day of August, 1914.

J. S. DARST,
Auditor of State of West Virginia.

To the introduction of which certificates and each of them the defendants, by counsel, objected, upon the ground that the same were immaterial, but the court overruled the said objection and permitted said certificates to be received and read in evidence and read to the jury. To which ruling of the court, in admitting said certificates in evidence, the defendants, by counsel, excepted and prayed that said exception be saved to them, which is accordingly done and made of the record. And this is defendants' Fourth Exception.

EXCEPTION NO. 5.

Be it further remembered that after the admission in evidence of the papers referred to in the foregoing exceptions, the plaintiff, further to maintain the issues on its part, offered in evidence a copy of the amended bill of complaint of the State of West Virginia in the chancery cause of State of West Virginia vs. Henry C. King et als., from the circuit court of West Virginia for the county of Wyoming (Exhibit No. 6 of said stipulation); a copy of the petition of Alexander McClintock filed in said cause (Exhibit No. 7 of said stipulation); a copy of the petition of Stoddard and Hall filed in said cause (Exhibit No. 8 of said stipulation); a copy of the amended petition of U. B. Buskirk, trustee and others, filed in said cause (Exhibit No. 9 of said stipulation); a copy of the demurrer and answer of Henry C. King to the amended petition of U. B. Buskirk, trustee, and

others, filed in said cause (Exhibit No. 10 of said stipulation); a copy of a decree entered Jan. 11, 1908, in said cause, dismissing the State's bill and the petition of Henry C. King (Exhibit No. 11 of said stipulation), and a map (Exhibit No. 12 of said stipulation) filed with the aforesaid petition of U. B. Buskirk, trustee, et als., purporting to show the lands claimed by them, which several papers (Exhibits No. 6 to 12 inclusive except said map, which is filed herewith as part hereof) are in words and figures as follows to-wit:

EXHIBIT NO. 6.

Fourth Amended Bill of Complaint.

To the Hon. R. C. McClaugherty, Judge of the Circuit Court of Wyoming County, West Virginia:

The amended bill of complaint of the State of West Virginia, plaintiff, against Henry Clay King, Robert E. Randall, Trustee, John R. Reed Trustee, Hamilton B. Bradshaw, Trustee; John Lemoyne, Trustee; William H. Gardner, Trustee; John P. T. Ingraham, Trustee; Pittsburg National Bank of Commerce, a Foreign Corporation; The Unknown Heirs of Wm. Reed, Deceased, whose names are unknown; David W. Armstrong, George O. Collins, Ben E. Green, James Maybrick, Florence E. Maybrick, Caroline Van Roques, Adolph Van Roques, Harrison T. Groom, The unknown Heirs of David B. Holbrook, Deceased, whose names are unknown; Jesse R. Irwin, Virginia Irwin, Ethel Irwin, Clara Irwin and Alvin Irwin, the four last named are infant heirs-at-law of Alvin Irwin, Deceased; Harris Hoyt, Marie E. Hoyt, C. F. Thomas, S. F. Dunham, Wm. C. Jones, John T. Wills and Nathaniel R. Benson, Defendants.

Filed in the Circuit Court of said County.

The plaintiff complains and says that at May rules, 1894, it filed its bill in this cause; at August rules, 1894, its amended bill; at February rules, 1896, its amended bill, and at May rules, 1896, it filed its amended bill and asks that it be treated and read as part of the original bill in this cause.

The plaintiff further complains that on the 23rd day

of June, 1795, the Commonwealth of Virginia granted to Robert Morris, assignee of Wilson Cary Nicholas, a large tract of land containing 500,000 acres, then situated in the State of Virginia, but now partly in the counties of Wyoming, Logan, McDowell and Mingo, the last mentioned county formed out of the territory formerly part of said Logan county, and made a county since the institution of this suit, in the State of West Virginia, and partly in the State of Virginia and Kentucky, lying principally on the Tug Fork of Sandy river and its waters and Guyandotte river and its waters; that said tract of land was, on the 16th day of November, 1795, by deed of that date, conveyed by the said Morris to James Swan, who departed this life in the year 1831, leaving said tract of 500,000 acres, among others, to his creditors; afterwards, to-wit, in the year 1838, by an act of the Assembly of Virginia, said tract, among others, was released from and forfeited for taxes and the same vested in one John P. Dunham as trustee for the benefit of said Swan's creditors; that said trust was kept up by successive appointments until said tract of land vested in the defendants, Robert E. Randall, trustee; that for a considerable part of the time from the year 1838 to the year 1881 there was no taxes paid on said land and the same became forfeited to the State of West Virginia, or as much as lies in said State; that in the year 1881 a suit was instituted by W. B. McClure, the commissioner of school lands for Wyoming county, to sell so much of said 500,000 acre tract of land as lay in the State of West Virginia for the benefit of the school fund of this State, and pending said proceedings the said Robert E. Randall, trustee, filed his petition for the redemption of said 500,000 acres, and by a decree of the Circuit Court of said county of Wyoming rendered on the day of April, 1883, he was permitted to redeem the same from said forfeitures by paying all the taxes due thereon up to and including the year 1883; a copy of said decree is herewith filed as part of this bill, marked "A".

The plaintiff would further complain that since the year 1883 the said 500,000 acre tract, or so much of same as lies in this State, has been omitted from the land books of each of the counties in this State, to-wit, Wyoming, Logan, Mingo and McDowell; that no taxes have been as-

sessed thereon for any purpose, and by reason of the failure of the owners thereof to enter said tract of land on the land books of either of said counties and have the same assessed with the State taxes thereon for the years 1884, 1885, 1886, 1887, 1888, 1889, 1890, 1891, 1892, 1893, 1894, and 1895, inclusive, that the same has become forfeited to the State of West Virginia and is liable to be sold for the benefit of the school fund of this State; for the failure of the owners thereof to have the same entered on the land books of the counties aforesaid for five consecutive years the title to said 500,000 acres has become forfeited and the title thereto vested in the State of West Virginia as provided by law.

The plaintiff further *complaints* that the heirs —Wm. R. Reed, deceased, the heirs of David B. Holbrook, deceased, and the heirs of Samuel Allison, deceased, the names and numbers of said heirs are to plaintiff unknown; that the Pittsburg National Bank of Commerce is a foreign corporation; that since the filing of the amended bill at May rules, 1895, in this cause Alvin Irwin who was made party defendant in said amended bill, has departed this life intestate on the day of....., 1895, leaving to survive him Virginia Irwin, *Ehtel* Irwin, Clara Irwin and Alvin Irwin, his heirs-at-law, who are all infants under the age of 21 years.

The plaintiff further complains that the defendants, Jesse R. Irwin, Harris Hoyt, Marie E. Hoyt, C. F. Thomas, S. F. Dunham, Wm. C. Jones, J. T. Wills and Nathaniel R. Benson, claim title to a 480,000 acres of land, which lies in the said counties of Wyoming, Logan, Mingo, and McDowell, and said last mentioned tract of land—a large portion of the territory which covered by said 500,000 acre tract; in fact, plaintiff is informed the two tracts overlap each other in the counties of Wyoming, Logan and Mingo and probably in McDowell county. Plaintiff is informed that Alvin Irwin, deceased, had at some time claimed one-fourth interest in said 480,000 tract of land, but before his death he conveyed his interest in said 480,000 acre tract to Jesse R. Irwin by deed which is of record in said Logan county clerk's office; all the other defendants herein claim some interest in said 500,000 acre tract; just what interest plaintiff is not informed.

of school lands for the county of Wyoming did on the 31st day of March, 1894, as required by section five of chapter 24 of the acts of 1893 of this State, make his report to the Circuit Court of said county, showing that so much of said 500,000 acres as lies in this State of West Virginia, together with other lands, had become forfeited to the State of West Virginia and liable to be sold for the benefit of the school fund, said report was recorded in the chancery order book of said Court and a suit or suits directed to be *be* brought in the name of the State of West Virginia to sell said 500,000 acre tract, together with other tract in said report mentioned; a copy of said chancery order is filed with the amended bill filed in this cause at May rules, 1895, and marked "W", and asked to be treated and read as part of this bill.

The plaintiff therefore prays that all the defendants herein mentioned, both the known and the unknown claimants to said 500,000 acre tract of land, or any part thereof, be likewise made parties hereto, and that a decree may be had for the sale of said 500,000 acre tract of land, or so much thereof as may be within this State subject to sale for the benefit of the school fund; and all such other, further and general relief, &c.

STATE OF WEST VIRGINIA,
By Counsel.

CHILDERS, *Sol.*

EXHIBIT NO. 7.

Petition of Alexander McClintock.
In Chancery.

State of West Virginia
vs.

Henry C. King et al.

Now pending in the Circuit Court of Wyoming County,
West Virginia.

To the Hon. R. C. McLaugherty, Judge of said Court:

The petition of Alexander McClintock would respectfully represent that the above styled cause is a suit brought by the State of West Virginia to sell cer-

tain lands in its bill mentioned for the benefit of the school fund, and among other things, the said suit is brought for the purpose of subjecting to sale five hundred thousand acres of land, which said land is claimed to be partly lying in said county, which is known as the Western Robert Morris grant of five hundred thousand acres; that the plaintiff has proceeded against said lands as forfeited to it for non-entry upon the assessor's land book of the proper county for five successive years, since the year 1869.

Your petitioner would further represent that he is the owner in fee simple of what is known as the *DeWitt-Clinton* survey of one hundred and forty-two thousand acres granted to the said DeWitt Clinton as *assignee* of William Duval on the 19th day of February, 1796; that he derived title regularly by sundry conveyances from the said DeWitt Clinton and his grantees; all of which will more fully appear by the abstract of said conveyances, which will be filed herewith in due time, marked Exhibit "X", and asked to be read as part of this petition, and duly certified copies of each, and all of the conveyances mentioned in said abstract will be filed herewith in due time marked, Exhibit numbers from one to, and asked to be *re'd* as part of this petition; that in addition to the interest so claimed by your petitioner the following other persons are claimants of and interested in parts of the tract of five hundred thousand acres of land sought to be sold in this suit, viz., G. O. Clinton, James Malcum, T. C. Hall, Helen M. Cunningham and J. B. Floyd, of Kanawha county, West Virginia, Robert Lee Benedict, whose residence is unknown to your petitioner, and the heirs of Samuel Benedict, deceased, whose names are unknown to your petitioner, and should be but are not made defendants to this suit.

Your petitioner would further represent that the said *DeWitt-Clinton* survey is forfeited to the State for non-entry upon the assessors' land books of the proper county for five successive years after the year 1869, and is liable to sell for the benefit of the school fund, but at the date of said forfeiture your petitioner here alleges that he and those under whom he claims had a good and valid title thereto, legal and equitable and superior to that of any other claimant; that there is now a suit pending in the Circuit Court of Logan county, West Virginia, against the

whole of the said tract of land, seeking to subject the same to sale for the benefit of the school fund; that he is a party defendant to the said suit, and has filed an answer therein setting up his title thereto and asking to be permitted to redeem the same.

Your petitioner further represents that the said *Dewit-Clinton* survey covers a large part of the territory of the western part of the said Wyoming county, and that the defendant, Henry C. King, is asking in the suit now pending in the Circuit Court of Logan county to redeem what is known as the Western Robert Morris grant of five hundred thousand acres, claiming that the same covers a large portion of the territory which is in fact covered by the said *DeWit-Clinton* survey, but *you* petitioner here denies that the said Henry C. King has title to the said five hundred thousand acres of land, on any part thereof; that even if he did have title thereto the same had been forfeited to the Commonwealth of Virginia long prior to the formation of this State, and became her absolute property and is now irredeemable.

Your petitioner would further represent that if ever the said Henry C. King has the right to redeem the said five hundred thousand acres of land, or any part thereof, that there is a suit now pending in the Circuit Court of Logan county wherein the State of West Virginia is plaintiff and John V. Lemoyne et al., are defendants for the purpose of subjecting to sale the same five hundred thousand acres of land; that the said suit was pending when this suit was instituted; and there is also another suit pending in said Logan Circuit Court wherein the State of West Virginia is plaintiff and unknown heirs of George Keith Taylor and others are defendants, which has for its object the subjecting to sale of what is known as the George K. Taylor two hundred and thirteen thousand acre tract which said tract of land covers over every part and parcel of the territory claimed by the said Henry C. King in the said five hundred — acre lying in Wyoming and Logan counties which last mentioned suit was also pending in said Court when this suit was instituted, and the said Henry C. King has filed answers in both the last mentioned suits, asking to be permitted to redeem the said five hundred thousand acres of land, as well as the Taylor two hundred and thirteen thou-

sand acres, and that a surveyor has been appointed by said Logan Circuit Court to locate the lines of each of said surveys and a commissioner appointed to ascertain the taxes due and report upon title, &c.; that if he has the right to redeem any of said lands he can redeem the same in said last mentioned suit in Logan county; duly certified copies of the records of said two suits are herewith filed, marked Exhibit "XX" and "YY," respectively, and are prayed to be read as parts hereof. Your petitioner here denies that the five hundred thousand acres of land, or any part thereof, lies in the said Wyoming county, and he also denies that there ever was such a grant as the five hundred thousand acre grant; that the same is absolutely void for the want of description, and that the land therein called for cannot be located, and petitioner also denies that the said Henry C. King has the true title from the said Robert Morris of the said five hundred thousand acres of land, even if there was any such land in Wyoming county, and denies that any part thereof is located in Wyoming county.

Your petitioner desires to redeem his said one hundred and forty-two thousand acres of land when the amount of taxes and interest are properly ascertained, and is willing and ready to pay whatever amount is right and proper that he should pay in order to redeem the same, and he here prays that this petition be taken, treated and read as his answer to plaintiff's bill; and secondly, that the proceedings in this suit be stayed until the matters involved in the said two suits now pending in Logan county can be properly determined, and in case the Court should hold that it has jurisdiction of these matters in part, then your petitioner prays that these proceedings be limited by proper decree so that the same will apply to and proceed against only such parts, if any, of the said five hundred thousand acres of land as is located in Wyoming county, and especially that no decree be entered in this cause against any of the lands of this petitioner that is located in Logan county; that if your Honor should hold, notwithstanding the pending of the said suit in Logan county, that he should pay into this suit a portion of the taxes and interest due on the part of said land lying in said Wyoming county that he be permitted to pay the

same to the commissioner of school lands or into Court that all that part of his lands lying in the county of Wyoming be redeemed from said forfeiture, and he further prays that no decree be entered in this suit affecting any portion of his said land in this county until he is permitted to redeem in said Logan county; and for such other, further and general relief as your Honor may see fit. And in duty bound, he will ever pray, &c.

ALEX MCCLINTOCK,
By Counsel.

VINSON & THOMPSON,
C. M. TURLEY,
J. B. ELLISON, *Sol's.*

EXHIBIT NO. 8.

Petition of Stoddard & Hall, Filed July 5th, 1901.

The Petition and Answer of Amos C. Hall and William H. Stoddard, Filed in the Circuit Court of Cabell County, West Virginia, in the Chancery Cause of the State of West Virginia vs. Henry C. King et al., Therein Pending.

To the Honorable Edward S. Doolittle, Judge of said Court:

Your petitioners would respectfully represent that the above mentioned cause is now pending in Your Honor's said court, the object of which is to subject to sale, for the benefit of the school fund, all that portion of a 500,000 acre tract of land or so much thereof as the title to which remains in the State, purporting to be situate in the counties of Wyoming, McDowell, Logan and Mingo, in the State of West Virginia, and the residue thereof in Buchanan county, Virginia and Pike county Kentucky; which tract is alleged to contain 500,000 acres, purporting to be granted by the Commonwealth of Virginia to one Robert Morris, by letters patent, bearing date on the 23rd day of June, 1795; the object of this suit (more definitely stated) being to subject to sale, for the benefit of the school fund, all that portion of said 500,000 acre survey the title to which remains in the state, which is situate in the State of West Virginia.

Your petitioners would further represent that they are the owners in fee simple of 20,000 acres of land, more or

less, situate, lying and being in the counties of Logan and Mingo in the State of West Virginia, being the same land which was purchased by your petitioners from one J. W. Hinchman, commissioner of school lands for Logan county, on the 3rd day of November, 1898, which land was sold to them in the suit of the State of West Virginia vs. one Jesse R. Irwin and others, then pending in the circuit court of said Logan county, and conveyed to them, your petitioners, by one J. B. Wilkinson, a special commissioner appointed for that purpose by decree entered in the last mentioned cause, on the 3rd day of November, 1898, which last mentioned decree also confirmed the sale thereof to your petitioners; which said tract of land had been directed to be sold, for the benefit of the school fund prior to that time, to-wit: on the 29th day of April, 1898, duly certified copies of said decree directing the sale thereof, the decree confirming said sale, and the said deed from J. B. Wilkinson, special commissioner, to your petitioners are herewith filed, marked, "Exhibit A, B, and C," respectfully and are here prayed to be read in connection herewith, A duly certified copy of the plaintiff's bill, as well as duly certified copies of all the other papers and orders in the last mentioned cause, all attached together under the same cover, will be filed herewith in due time if required, marked "Exhibit R, R," and asked to be read in connection herewith, as parts hereof.

Your petitioners further state that defendant, Henry C. King claims to be the former owner of the said 500,000 acre tract of land, and had filed a petition in the aforesaid suit of the State of West Virginia against Henry C. King and others now pending in the circuit court of said Cabell county, asking to be permitted to redeem the same, by paying the taxes, interest and costs due thereon; and your petitioners further state that the said Henry C. King is claiming that the said 500,000 acre survey overlaps much the greater portion of your petitioners's said 20,000 acres, purchased by them from J. W. Hinchman, commissioner of school lands as aforesaid, or, in other words, the said Henry C. King is claiming about 20,000 acres of land in said Logan and Mingo counties which your petitioners purchased from J. W. Hinchman, commissioner as aforesaid, by basing his claim on a pretended theory (which distorts the true lines

of the 480,000 acres on paper, and attempts to make it appear that only a small portion of your petitioner's said 20,000 acres of land lies in said Logan county, and none thereof in Mingo county; but your petitioners aver that the said 20,000 acres of land owned by them as aforesaid is a part and parcel of a 480,000 acre tract of land granted by the Commonwealth of Virginia to one Robert Morris, by letters patent bearing date on the 23rd of March, 1795 and that the lines and corners of the said 480,000 acre tract are marked and are well known; that the lands and timbers mentioned and set out in the aforesaid deed from J. B. Wilkinson, Special Commissioner, to your petitioners which are excepted and excluded from the operation of said deed are fully set out and described in a list herewith filed, marked "Exhibit Exclusions," which list is here prayed to be read in connection herewith, as part hereof; that your petitioners do not own or claim any of the lands or timbers mentioned and set out in said list; but they claim and own all the rest, residue and remainder of the lands and timbers in the counties of Logan and Mingo covered by the exterior lines of the said 480,000 acre tract of land as run and located by one Wm. T. Sarver, hereinafter mentioned and described.

Your petitioners would further state as matters of description, and as allegations of facts that the said 20,000 acres of land owned by them as aforesaid is a part and parcel of the same lands sold by one Wm. B. McClure, commissioner of school lands for Wyoming county, to the said Jesse R. Irwin, on the 15th day of July, 1885, in a proceedings then pending in the circuit court of said Wyoming county wherein the said Wm. B. McClure, commissioner of school lands was plaintiff and seeking to sell for the benefit of the school fund the said 480,000 acre tract of land or so much thereof as the title to which remained in the State; that the said Jesse R. Irwin being the former owner of the said 480,000 acre tract of land, the said court subsequently, to-wit; on the same day July 15th, 1885, by a decree in said proceedings, confirmed the said sale and directed a deed to be made therefor to the said Jesse R. Irwin, with the exceptions and reservations set out in the decrees entered in the said proceedings, which exceptions and reservations, with others are fully set out in "Exhibit

Exclusions" hereinbefore mentioned; that prior to the said *sole*, to-wit; at the October term of said last mentioned court, the said Jesse R. Irwin filed his petition in said last mentioned proceedings asking to be permitted to redeem the said 480,000 acre tract of land or so much thereof, as the title to which remained in the State, and one Wm. T. Sarver, a practical surveyor, was, by a decretal order in said proceedings entered, appointed and directed to go up the said lands and to do such surveying as the said Jesse R. Irwin might direct, to report the amount of junior and other adverse claims within said 480,000 acre survey, and also to report the amount of taxes, interest and costs due upon said lands the title to which remained in the State.

The said Wm. T. Sarver had, prior to that time, done a considerable amount of surveying on said 480,000 acre tract, and was, to a great extent, familiar with not only the exterior lines, but the location of the junior and other adverse claims therein, and he was therefore able to, and did file his report under said decree at the July term, next, of the last mentioned court, 1885.

He reported, among other things, that of the said 480,000 acres of land there was 40,000 acres, yet unsold and undisposed of, and that of that 40,000 acres there was 20,000 acres in Logan county 10,000 in Wyoming county, and 10,000 acres in McDowell county and the said court, by a decree in said proceeding on the 15th day of July, 1885, confirmed the said report.

After the sale of the said 480,000 acre tract was made and confirmed to the said Jesse R. Irwin, to-wit, on the 25th day of March, 1886, the said Wm. B. McClure, commissioner of school lands as aforesaid by deed bearing date, by virtue of the authority vested in him, by the last mentioned decree made, executed, acknowledged and delivered to the said Jesse R. Irwin a deed therefor, all of which last mentioned allegations of fact and matters of description will fully and at large appear from duly certified copies of the petition of Wm. B. McClure, commissioner of school lands in his said proceedings, and the petition of Jesse R. Irwin therein filed, and all the orders and decrees in said proceedings thereto attached, which will be herewith filed in due time if required, marked on the back

thereof "Irwin Purchase" and prayed to be read in connection herewith as parts hereof.

Your petitioners would further state that the said Jesse R. Irwin subsequently made the following conveyances of interests in the said 480,000 acre tract of land, to-wit: To one Charles F. Thomas, an undivided fourth, March 25th, 1886, to one Alvin Irwin, an undivided fourth, April 21st, 1886, to one Harris Hoyt an undivided fourth, April 21st 1886, and Harris Hoyt conveyed this undivided fourth to one Marie E. Hoyt, wife of the said Harris Hoyt, and the said 20,000 acres of land situated in the county of Logan was assessed for the year 1886 as follows, to-wit: To Jesse R. Irwin, $\frac{1}{4}$ of 20,000 acres, 5,000 acres; to Harris Hoyt, $\frac{1}{4}$ 20,000 acres, 5,000 acres, to Alvin Irwin, $\frac{1}{4}$ 20,000 acres, 5,000 acres, to Charles F. Thomas, $\frac{1}{4}$ 20,000 acres, 5,000 acres.

Petitioners further say that they are informed and believe that on the 15th day of July, 1885, the said Jesse R. Irwin and his co-owners in pursuance of his said purchase, took possession of all his said lands so purchased by him in the State of West Virginia, and that he and his co-owners and grantees continued to hold possession thereof, and pay all the taxes thereon until the same became forfeited to the State as hereinbefore mentioned, and that your petitioners took possession of the said 20,000 acres on the 3rd day of November, 1898, and have been in possession thereof ever since that time, and are now in possession of the same; that they caused their said 20,000 acres of land to be properly assessed in the said Logan and Mingo counties and have paid all the taxes due on the same.

Your petitioners would further say that in the meantime, to-wit; some time in the year 1889, one U. B. Buskirk, commissioner of school lands for Logan county, and one, Wm. B. McClure, commissioner of school lands for Wyoming county, instituted proceedings in the circuit court of their respective counties against portions of these same lands for the purpose of subjecting them to sale for the benefit of the school fund, claiming that the same were not included in the said Irwin purchase, and the said Marie E. Hoyt, who then owned an interest in the said 480,000 acre survey, in proceedings instituted for the purpose in the circuit court of the United States for the district of West Virginia, sit-

ting at Charleston, sued out injunctions against the said commissioners of school lands, and enjoined them and each of them from selling or attempting to sell any more of these lands, that said proceedings were prosecuted to final decree, and on the 24th day of May, 1895, the said commissioners of school lands, their agents attorneys and all *other* acting under them were perpetually enjoined and restrained from selling or attempting to sell, and from surveying or attempting to survey any more of these lands, all of which facts will fully and at large appear from duly certified copies of said injunction order, and final order, perpetuating the same herewith filed, marked "Exhibit I. O. and I. P.", respectively and are here prayed to be read in connection herewith as parts hereof.

Your petitioners would further state that in said proceedings the question of the location of the exterior lines of the said 480,000 acre survey was directly at issue, and it was therein adjudicated and decided that the exterior lines of the said 480,000 acre survey as run by the said Wm. T. Sarver was the true location of the said survey; that the said last mentioned orders have never been appealed from or otherwise reviewed; but that the same are now unappealable; that the said 20,000 acres of land owned by your petitioners and purchased by them from the State as aforesaid, is a part and parcel of the said 480,000 acre survey, being all that portion thereof which is situated in the counties of Logan and Mingo, and State of West Virginia, a duly certified copy of the map and plat of the said 480,000 acre survey as run and located by the said Wm. T. Sarver and used in said injunction suit is herewith filed, marked "Exhibit W. T. and is here prayed to be read as part hereof.

Your petitioners would further state that on the said 3rd., day of November, 1898, the said 20,000 acres of land so owned by them was sold by the said commissioner of school lands of Logan county, and purchased by them, and the sale thereof *confirmed* to them by decree of the circuit court of the last mentioned county in the aforesaid suit of the State of West Virginia against the said Jesse R. Irwin, et al., therein pending; that the title to the said 20,000 acres of land had forfeited to the State on account of the failure of the grantees of the said Jesse R. Irwin to pay the taxes due thereon since his said pur-

chase from Wm. B. McClure, commissioner of school lands for Wyoming county.

Your petitioners would further state that they were, prior to the time of the said sale by the State to them of the said 20,000 acres, the owners by purchase and conveyance of all the interests of the said Emma J. Pomeroy, Marie E. Hoyt, and Jesse R. Irwin in the said 480,000 acres in West Virginia, and are advised that by virtue of such purchase they are now the owners of *of* the equity of redemption of the said Pomeroy, Hoyt and Irwin *an* that portion of said 480,000 acres overlapped by the DeWitt Clinton survey, of 142,000 acres and that as such owners they have filed a petition in the aforesaid suit of the State of West Virginia against Jesse R. Irwin et al., in said Logan circuit court, asking to be permitted to redeem so much thereof as lies within said interlock; that it has already been adjudged by decree in the last mentioned cause that the said Pomeroy Hoyt and Irwin were the former owners and were entitled to the excess of the purchase money therefor, and your petitioners are also advised that by reason of their said purchase and conveyance from the said Pomeroy, Hoyt and Irwin, that they are the owners of whatever right or semblance of right or title they have or may have in all that part of said 480,000 acre tract situate in the State of West Virginia, a duly certified copy of said last mentioned deed of conveyance will be filed herewith in due time if required marked "Exhibit G".

Your petitioners would further state that neither the said Jesse R. Irwin, Marie E. Hoyt or Emma J. Pomeroy ever appeared in the aforesaid suit first *abobe* mentioned, that the said Marie E. Hoyt and Emma J. Pomeroy were then and are now non-residents of the State of West Virginia, and were never served with any process in said suit. These petitioners were not parties to this suit at the time the decree of the 30th. September, 1897, was entered nor were they parties to the appeal taken from said decree to the Supreme Court of Appeals of West Virginia by the plaintiff, nor were the said Jesse Irwin, Marie E. Hoyt or Emma J. Pomeroy parties to said appeal. They were not served with a summons to answer the state's appeal from said decree and they did not appear therein, and they are advised that they are not bound or precluded by the decree

of said Supreme court on said appeal. That the commissioner who pretended to report in said suit never posted any notice as required by law at the front door of the court house of Wyoming county in which county said suit was then pending, and your petitioners are further advised that they as such owners and successors in title to the said Pomeroy, Hoyt and Irwin have the right to have said cause first above mentioned reheard as to them, and they here pray that all the orders and decrees entered in said cause be set aside as to them in so far as the same in any way *effects* or tends to *effect* the said 480,000 acres survey in Logan and Mingo counties and especially that part thereof which attempt to *effect* or tends to *effect* the said 480,000 acre survey in Logan and be permitted to put in full defense to said suit the same as if they had been made parties thereto in the beginning.

Your petitioners here deny that the said Henry C. King has title to the said 500,000 acre survey or any part thereof; that even if he or his alleged grantors ever had any title thereto, the same hath long since forfeited to the State for the failure of the owners thereof to cause the same to be entered upon the assessor's land books of the proper counties for taxation for more than five successive years since the year 1869, to-wit, for either of any of the years from 1869 to 1901 inclusive.

Your petitioners further state that they are advised that in as much as the lines of the said 480,000 acre survey as run by said Wm. T. Sarver, were fully adjudicated and settled, and the said Wm. B. McClure, commissioner of school lands for Wyoming county, and U. B. Buskirk, commissioner of school lands for Logan county, perpetually enjoined from further interference with said location as made by said Sarver, by said final decree of the circuit court of the United States for the District of West Virginia at Charleston, that the State has no right now to take any further steps to bring said location into controversy, that said last mentioned court was a court of competent jurisdiction, that the same parties and same subject matter were before said court, that is to say, the interest of the State and your petitioners' predecessors in title, and the question of the location of the said 480,000 acre survey was directly at issue, and it was therein fully adjudicated and

settled that the lines thereof as run by the said Wm. T. Sarver were the true lines thereof, and his survey thereof was fully established.

That your petitioners are advised that by reason of said sale by the State, of the said 20,000 acres of land and the purchase thereof, by your petitioners, and the conveyance thereof to your petitioners by the said J. B. Wilkinson, Special commissioner, that they your petitioners are now the owners in fee simple of the said lands, and that the State is divested of all her right, title and interest therein, and that the State has no right now to proceed against these lands in the way.

And your petitioners are also advised that defendant, Henry C. King has no right to redeem the said 20,000 acres of land purchased by them as aforesaid, for the following reasons:

1st: The State, in a regular suit having sold said lands, received the purchase money therefor, and conveyed them to your petitioners, has no right to proceed against them again, and could not until a subsequent forfeiture.

2nd: The sale by the State to *you* petitioners not only passed all the right title and interest of the former owners of the said 480,000 acres of land whose titles or claims were forfeited, but it passed all the right, title, interest or claim whatsoever, of all other persons to any of the lands so sold, whose right, title, interest or claim was likewise forfeited, whether claimed under the 500,000 acre survey or any other claim.

Even if Henry C. King had a good title to these lands (which is now denied, of course) he, having suffered his title to remain in the State until it was sold by the State, has no right now to ask the State to get it back for him. He not only suffered it to be sold by the State to your petitioners, but his predecessors in title suffered it to be sold by the State to Jesse R. Irwin in 1885, as hereinbefore stated, and the State not having the right to do so will certainly not undertake to get these lands back for Henry C. King.

4th: The true title, as well as all other claims of title whatsoever to the said 20,000 acres of land were forfeited to and absolutely vested in the State, not only at the time of the sale thereof by the State to your petitioners, but at

the time of the said sale to Irwin in 1885, and by virtue of said sales passed to and become vested in them, and cannot be denied by the State; neither can the location of the Sarver survey be denied or disputed by the State, and being so advised, your petitioners here pray that this petition be taken, read and treated as their answer in the first suit in this petition mentioned, and that the said cause of the State of West Virginia against Henry C. King and others hereinbefore first mentioned, be dismissed, or that so much thereof as *effects*, or tends to affect in any way all *tha* portion of the said 480,000 acre survey or any part thereof, which is situate in the said counties of Logan and Mingo, be dismissed from the said suit, and *thay* your petitioners (title thereto be upheld and protected, and having fully answered, pray to be hence dismissed with their reasonable costs by them in this behalf expended.

AMOS C. HALL,

WM. H. STODDARD,

By Counsel.

J. B. ELLISON,

ALBERT C. HALL, *Sols.*

EXHIBIT NO. 9.

Amended Petition of Buskirk, Trustee.

In Chancery.

State of West Virginia

vs.

Henry C. King and others.

In the Circuit Court of Marion County.

The amended Petition of U. B. Buskirk, Trustee; U. B. Buskirk, J. Cary Alderson; R. L. Shrewsbury and W. R. Lilly against the State of West Virginia, Henry C. King, W. K. Cowden, Trustee; G. A. Porter, Fred Gardner, J. L. Caldwell, Walter L. Ashby, Elson Crawford, Mrs. T. J. Prichard, Maud J. McClintock, E. T. England, Trustee; F. T. England, R. L. Joyce, Trustee; Rosa Ellison, J. B. Ellison, Helen M. Cunningham, Frank Lee Benedict, Charles K. Crawford, Evelyn C. Clark, Helen Margaret Cunningham, J. Benedict Cunningham, S. S. Althizer, and Mae Mullins, as well as the answer of said U. B. Buskirk,

Trustee; U. B. Buskirk, J. Cary Alderson, R. L. Shrewsbury and W. R. Lilly, to the Plaintiff's original and several amended bills; the answer and petition of Henry C. King, asking to redeem the hereinafter described land; the answer of J. K. Cowden, Trustee, asking to redeem said land, and the answer of R. L. Joyce, E. T. England and others asking to redeem said land, filed in the above-styled cause.

The said U. B. Buskirk, Trustee; U. B. Buskirk; J. Cary Alderson; R. L. Shrewsbury and W. R. Lilly; hereinafter called "Petitioners," represent unto your Honor,

1st: That said petitioners are the owners in fee simple subject to the dower interest of the defendant, Mae Mullins, the following real estate situate in Logan and Mingo counties, West Virginia, and bounded and described as follows, to-wit:—

"Beginning at a stone on the North line of the Sarver Survey of the 480,000 acres, Robert Morris tract, at the point where Guyandotte River crosses said line and on the Eastern bank of said River, thence leaving in a Southerly direction following the meanders of Guyandotte River crossing Buffalo and Big Huff's Creek at their mouths, about 5,760 poles to where said river crosses the Wyoming County line, thence running in a Northerly direction with said County line about 4,800 poles to a stone where the said Wyoming County line crosses the North line of said survey, thence on said Northerly line of said Sarver Survey about 3,840 poles to the place of beginning: Containing 20,000 acres, more or less."

Excepting therefrom the several junior patents and school land sales protected by the Constitution of West Virginia, described in the list of exceptions herewith filed as a part of this Petition, marked Exhibit "Exclusions," in which exhibit the several tracts making up said exclusion are set out with the name of the party to whom the patent or school land sale was made and date of the patent or sale; the number or acres and the reference to the public records wherein said patent or school land deed is recorded.

That the lines separating said above mentioned excluded tracts from the residuum owned by your petitioners within the above described boundary are definitely shown by eighteen descriptions herewith filed as a part of this petition

and marked "Exhibit Description No. 1; No. 2; No. 3; No. 4; No. 5; No. 6; No. 7; No. 8; No. 9; No. 10; No. 11; No. 12; No. 13; No. 14; No. 15; No. 16; No. 17; No. 18.

Petitioners herewith file as a part of this petition and answer a map showing by yellow colored lines the exterior boundary of the said tract of land first above described as 20,000 acres and by green colored lines the portion of the land embraced in said description as being excluded, and by red colored lines the residuum owned by your petitioners as well as by blue colored lines and enclosed thereby the location of the 500,000 acres as claimed by the defendant, Henry C. King, by purple colored lines the location of the lines of the 500,000 acres as adjudicated by this Honorable Court; said map showing the location of Guyandotte River, Huff's Creek, Buffalo Creek; Elk Creek, Spice Creek, Leatherwood Creek, and the several forks and branches of said creeks, which said map is herewith filed as a part of this Petition, marked "Map U. B. B."

Petitioners *further* allege that they derived title to said land first above described from the following grants, school land sales, judgments, decrees of court, mesne conveyances, possession and the payment of taxes which together make up a complete title in your petitioners and prevents the sale of the land as prayed for in the Plaintiff's Bills or the redemption thereof as prayed for in the answers of Henry C. King, W. K. Cowden, *Trustee*, and R. L. Joyce, *Trustee*.

TITLE.

2nd: Petitioners further say that on the 23rd day of March, 1797, the Commonwealth of Virginia, by letters patent of that date, granted to Robert Morris 480,000 acres of land which will appear from a copy of the patent heretofore filed in this cause and here referred to as a part of this petition. That said 480,000 acres of land, after the date of said grant, was not entered upon the Land Books in any of the counties wherein same was situated and that it remained off of the land books of said counties and was, on the 24th day of November, 1881, forfeited to the State of West Virginia for non-entry on said land

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books in said counties of Wyoming, Logan and McDowell, wherein the same was situate, On which date W. B. McClure, Commissioner of School Lands of Wyoming County instituted a suit for the purpose of selling said 480,000 acres of land for said forfeiture, styled,

In Chancery.

“W. B. McClure, Commissioner of School Lands. The 480,000 Acres of Land Formerly Owned by Robert Morris and Now Claimed By Jesse R. Irwin.”

That in said suit, after the cause had been regularly matured for hearing and a petition had been filed by Jesse R. Irwin, the alleged claimant of said land, to redeem the same on the 12th day of October, 1884, an order was therein entered appointing Wm. T. Sarver a Survey and Commissioner to go upon the land and “do such surveying as said “Irwin may direct and to report his proceedings to court “and further directing him to ascertain and report the “amount of taxes, interest and cost due on said survey of “480,000 acres and further directing said Surevor to ascertain and report the amount of junior and adverse titles in “said survey to which the owners have a legal title.” That in order to execute said decree, it became necessary to locate said exterior lines of said 480,000 acres and on the 30th day of December, 1884, in pursuance of said decree, said Wm. T. Sarver began the survey of said 480,000 acres of land and after locating the beginning corner, ran the lines of said survey according to the course and distance thereof and failing to find the corner trees called for in the patent, said Sarver, at the point where the distance on each line gave out, marked trees as the corner trees of said 480,000 acres of land and marked other and sundry trees on various creeks and rivers crossing by him in said running which said trees and monuments so marked by him have at all times since said survey been recognized by the adjoining land owners and well known to the State of West Virginia through and by her Commissioner of School Lands as the trees and monuments marking upon the ground the exterior boundary of the 480,000 survey and said trees and monuments have been so recognized and known for over a quarter of a century. All of which will more fully appear from the report of the said Sarver to-

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gether with the map made by him of said survey which report and map were filed in said last mentioned cause and confirmed by the final decree therein, and said report and map have heretofore been filed in this cause with the deposition of George Sarver, one of the chainmen on said survey and respectively marked: Report "Exhibit No. 1 with the deposition of George Sarver," and map "Exhibit No. 2, filed with the deposition of George Sarver."

That said Sarver, after making said survey and basing his report upon the exterior lines of the 480,000 acres, as run and located by him by said survey, on the 15th day of July, 1885, in pursuance to the said order made a report showing that there were within the exterior lines of the 480,000 acre survey, as located by him, 40,000 acres of the 480,000 not covered by junior claims as follows: 10,000 acres in Wyoming County; 10,000 acres in McDowell County, and 20,000 acres in Logan County.

On the 15th day of July, 1885, said report, based upon said location was confirmed by a decree entered in said cause and a sale of said 40,000 acres of land directed to be made at public auction, without being advertised, in pursuance to which decree the sale was made by said W. B. McClure, Commissioner of School Lands as aforesaid to Jesse R. Irwin, and said sale in pursuance of said decree, was reported to the Court, and by a final decree entered in said cause duly confirmed and a deed directed to be made to said Irwin upon the payment of the purchase money for said land.

On March 25, 1886, the purchase money for said land having been fully paid, in pursuance to the decree in said cause, W. B. McClure, Commissioner of School Lands of said Wyoming County, conveyed said land to Jesse R. Irwin. All of which appears from a duly certified copy of the record of the proceedings in the cause of

"W. B. McClure, Commissioner of School Lands of Wyoming Co.,

vs.

The 480,000 Acres Formerly Owned by Robert Morris and Now Claimed by Jesse R. Irwin,"

heretofore filed in this cause, and here referred to as part of this petition.

On March 25, 1886, Jesse R. Irwin conveyed to Charles F. Thomas an undivided one-fourth interest in said land; on April 21, 1886, said Irwin conveyed to Alvin Irwin an undivided one-fourth interest in said land and on the same day said Jesse R. Irwin conveyed to Harris Hoyt an undivided one-fourth interest in said land. On April 31, 1886, Harris Hoyt conveyed to Sumner T. Dunham his undivided one-fourth interest in said land. On August 9, 1886, said Dunham conveyed to Marie E. Hoyt his one-fourth interest in said land, and on March 8, 1887, Alvin Irwin conveyed to Jesse R. Irwin his undivided one-fourth interest in said land. In all of which said deeds, said land was described:

"By map and survey of said tract made by Wm. T. Sarver under a decree of the Circuit Court of Wyoming County, West Virginia and filed in the Clerk's Office of said County." Which map and report were the same as filed in said cause of W. B. McClure Commissioner of School Lands vs. The 480,000 acres and in this cause marked "Exhibit No. 1, with the deposition of George Sarver" and map "Exhibit No. 2, with the deposition of George Sarver."

Petitioners further allege that in the year 1889 the said Marie E. Hoyt claiming an undivided one-fourth interest in the land described in this suit under the deed from Jesse R. Irwin to Harris Hoyt and from said Hoyt to Sumner T. Dunham and from Dunham to her, instituted a suit in the Circuit Court of the United States for the District of West Virginia, against W. B. McClure, Commissioner of School Lands of Wyoming County and U. B. Buskirk, Commissioner of School Lands of Logan County, alleging the sale by the Commissioner of School Lands of Wyoming County in the proceedings set up against the 480,000 acres to Jesse R. Irwin and the conveyance from Irwin to her as herein set out and alleging that she was the owner of the interests of the State of West Virginia to said land under said sale and that said 480,000 acres was located according to the Sarver Survey herein *refer-ed* to and that said Commissioner of School Lands, W. B. McClure, and Commissioner of School Lands, U. B. Buskirk, were attempting to sell said land as forfeited or wasted and unappropriated land, notwithstanding said sale of the 480,000 acres

and that the sale by said Commissioners, if permitted to be made, would cast a cloud upon her title and praying for an injunction enjoining the said Commissioners of School Lands from proceeding to sell said land on the ground that the State of West Virginia was estopped from again proceeding against the land included within the Sarver Survey of 480,000 acres, of which the land first herein described is a part.

That said Commissioners of School Lands answered said bill and that on the 24th day of May, 1895, by a final decree entered in said cause, said Commissioners of School Lands of Logan and Wyoming Counties were perpetually enjoined and restrained from selling or attempting to sell any of the land described in said Sarver Survey of the said 480,000 acre patent. That said decree was a final adjudication now binding upon the State of West Virginia and all persons attempting to redeem any land from her that said Sarver survey is the correct and proper location of the 480,000 acres and all the right, title and interest of the State of West Virginia in and to any lands not protected by the Constitution of West Virginia, were, by said sale, vested in said Jesse R. Irwin and then owned by the said Marie E. Hoyt. Which will appear from a duly certified copy of this Bill, answer and final decree made from said cause and herewith filed as a part of this Petition marked "Exhibit Hoyt Cause."

On the 28th day of July, 1893, Jesse R. Irwin, Harris Hoyt, Marie E. Hoyt, Alvin Irwin and Marie Irwin, his wife, conveyed the 20,000 acres of land herein first described to Emma Idelia Pomeroy, by a deed of that date, a duly certified copy of which deed has been heretofore filed in this cause and is here referred to as part of this petition and answer and marked "Exhibit Pomeroy Deed."

Petitioners further say that prior to the said deed to Emma I. Pomeroy, referred to as "Exhibit Pomeroy Deed" and after the conveyance from said Jesse R. Irwin to Charles F. Thomas, Alvin Irwin, Harris Hoyt, and the conveyances from Harris Hoyt to Sumner T. Dunham and from said Dunham to Marie E. Hoyt, and from said Alvin Irwin to Jesse R. Irwin, describing said land conveyed in said deeds with reference to the map and report of said Wm. T. Sarver and making said map and report a part of

said deeds and after the recordation of said deeds in Logan County Court Clerk's Office, the said land, according to said Sarver's survey was entered for taxation on the Assessor's land books of Logan county for the year 1887 in the name of said Jesse R. Irwin, Harris Hoyt, Marie E. Hoyt, Charles F. Thomas and Alvin Irwin as a tract of 20,000 acres; that said land was again entered for taxation upon said land books in the year 1892, with four years' back taxes and interest, in the name of said parties; all of which taxes were, by said parties duly paid. And in the year 1893, said land was entered on said land books in the name of Marie E. Hoyt and Alvin Irwin for the taxes of said year; said taxes not being paid, was returned delinquent, and in the year 1894, the said land described in "Exhibit Pomeroy Deed" was entered on said land books of said county as 20,000 acres and charged to Emma I. Pomeroy. That taxes for said last year not being paid, said land was again returned delinquent; that in the year 1895, said land not having been redeemed from either of the delinquents above mentioned, the same was sold by the Sheriff of Logan County and purchased by the State of West Virginia at a sale for delinquent taxes made in said year.

That the Auditor of West Virginia, after the expiration of the time to redeem said land had expired, no redemption having been made, certified said land as purchased by the State of West Virginia at said delinquent sale, to the Commissioner of School Lands of Logan County, in pursuance to Sec. 2 Chapter 5 of the Code of West Virginia. J. W. Hinchman, Commissioner of School Lands of Logan County, in pursuance to Sec. 6 of Chapter 105, of the Code, reported said land, so reported to him by the Auditor as tracts No. 42 and 43, in his annual report to the Circuit Court of Logan County, as being owned by the State and liable to sale for the benefit of the school fund, and in pursuance of the report of said Commissioner of School Lands, the State of West Virginia on the 17th day of June, 1897, instituted a suit in the Circuit Court of Logan County, West Virginia, against Jesse R. Irwin, Harris Hoyt, Charles F. Thomas, Maria Irwin, Virginia Irwin, Ethel Irwin, Clara Irwin, Alvin Irwin, Emma I. Pomeroy, J. B. Wilkinson and Marie E. Hoyt, alleging the delinquency of said land for said taxes and sale thereof to the

State, as herein set out, and praying for the sale of said land for the benefit of the school fund; that said cause, after having been regularly matured, for hearing, was, by a decree entered herein, referred to J. E. Peck, a commissioner in chancery, with directions to report the taxes due upon said land and the names of the owners thereof to said Court; that said Commissioner, in pursuance to said decree reported to the Court under the first requirement of said decree as follows:

"First. Each parcel of land in the plaintiff's bill mentioned that is liable to sale for the school fund, the number of acres there may be in each of said tracts and its location.

Under this requirement your commissioner would report that in March 1886, Jesse R. Irwin held a decree from Com'r of School lands W. B. McClure, of Wyoming County, W. Va., for 20,000 acres of lands, situate, and lying on east side of Guyandotte River in Triadelphia District, Logan County West Virginia, all of which was returned delinquent for non-payment of taxes; was purchased for the State by the sheriff of Logan County; has not been redeemed, and is thereupon forfeited to the State of West Virginia and liable for sale to benefit of the school fund. In 1887 this land was sold for delinquent tax to H. K. Shumate. In 1892 it was placed on the land books of Logan County, with four years' back tax and interest charged, at which . . . tax and interest was paid. In 1886 Jesse R. Irwin deeded $\frac{1}{4}$ undivided interest to Harris Hoyt, $\frac{1}{4}$ undivided interest to Alvin Irwin, $\frac{1}{4}$ undivided interest to C. F. Thomas. In 1887 Alvin Irwin deeded his $\frac{1}{4}$ undivided interest to Jesse R. Irwin. In 1893 Jesse Irwin, Harris Hoyt, Maria Hoyt, Alin Irwin and Maria Irwin deeded 20,000 acres to Emma Pomeroy. It was returned delinquent for 1893 in the name of Alvin Irwin and Maria Hoyt; in 1894, returned delinquent in name of Emma Pomeroy; in 1895 returned delinquent in name of Emma Pomeroy as 16,000 acres, 4,000 acres having been transferred to Mingo County, W. Va., and in 1896 it was dropped from land books of Logan County."

Said Commissioner also reported the amount of taxes due thereon, and on the 28th day of April, 1898, by a decree entered in said cause the report was made by said

Commissioner, J. E. Peck, was confirmed, and said land so reported by said Commissioner, J. E. Peck was decreed liable to sale for the benefit of the school fund, and by said decree directed to be sold at public auction by J. W. Hinchman, Commissioner of School Lands, after advertising the time, terms and place of said sale as provided in said decree for four *secessive* weeks in some newspaper published in Logan County.

At the July Term of the Circuit Court of Logan County, 1898, the sale of said land, after having been advertised by said Commissioner Hinchman, in pursuance to said decree was begun when the defendant Henry C. King caused to be served upon said Commissioner Hinchman a temporary restraining order from the Circuit Court of the United States for the District of West Virginia, obtained against said Commissioner Hinchman, in a suit brought in said Court by Henry C. King. That, in obedience to said temporary restraining order, said sale was postponed.

But said land was again advertised for sale and on the 18th day of October, 1898, said land was sold at public auction at the front door of the court-house of Logan county by said J. W. Hinchman, Commissioner of School Lands, in pursuance of the decree in said cause; at which sale said land was purchased by W. H. Stoddard and Amos C. Hall. That on the 3rd day of November, 1898, said sale of land by said Hinchman, Commissioner of School Lands to said W. H. Stoddard and Amos C. Hall was duly confirmed by a decree entered in said cause of the State of West Virginia against Jesse R. Irwin, et al., and J. B. Wilkinson was appointed Special Commissioner by the decree confirming said sale to convey said land to Stoddard and Hall when the purchase money was fully paid. J. B. Wilkinson, Special Commissioner, in pursuance of said decree, on the 18th day of November, 1898, conveyed said land to said W. H. Stoddard and Amos C. Hall; all of which proceedings had in the cause of the State of West Virginia against Jesse R. Irwin and others will appear from a duly certified copy of the record in said cause herewith filed as a part of this petition, marked "Exhibit State of West Virginia vs. Jesse R. Irwin et als., Record."

Petitioners further say that on the 21st day of July, 1898, the defendant herein, Henry C. King, filed a bill in

the Circuit Court of the United States for the District of West Virginia, against the said J. W. Hinchman, Commissioner of School Lands of Logan County, West Virginia, alleging that said King was a citizen of the State of New York and said Hinchman, a citizen of Logan County, West Virginia, and further alleging that said King was the owner of the 500,000 *acre*- patented to Robert Morris and sought to be sold by the plaintiff in this present cause of the State of West Virginia against Henry C. King, et als., and claiming the land described in "Exhibit Pomeroy Deed" under the said 500,000 patent, and under the title set up in this cause of the State of West Virginia vs. Henry C. King and others and alleging the State had no right to proceed against or sell the land on account of the orders and decrees having been entered in the cause of the State of West Virginia against Henry C. King and others praying for an injunction restraining said Hinchman, Commissioner of School *la*-ds, from selling said land in the cause of the State of West Virginia against Jesse R. Irwin and others; that upon the filing of said bill, a temporary restraining order was entered enjoining said Commissioner from proceeding with said sale. That said J. W. Hinchman, Commissioner of School Lands of Logan County, appeared in the cause of said Henry C. King against the said J. W. Hinchman, in the Circuit Court of the United States for the District of West Virginia, and filed his answer to said bill, contesting the right of the said Henry C. King, to said injunction; that on the 14th day of January, 1898 upon an issue made up by said bill and answer the said Circuit Court of the United States for the District of West Virginia entered a final decree in said cause dissolving said injunction, and thereby adjudicating that the State of West Virginia, in the cause of the State of West Virginia against Jesse R. Irwin did have the right and authority to sell said land, and that the said Henry C. King did not have any right, title or interest in the land described in "Exhibit Pomeroy Deed", and sold in the case of the State of West Virginia vs. Jesse R. Irwin and others.

That said adjudication has never been appealed from or otherwise set aside, but is now a binding adjudication against the said Henry C. King as to the claim of title set up by him to the land described in this petition.

A duly certified copy of the bill and answer filed in said cause and the order dissolving said injunction is herewith filed as a part of this petition and answer marked "Exhibit King vs. Hinchman Record."

Petitioners further say that the Bill filed in the "Exhibit King vs. Hinchman Record" and the order granting the temporary injunction, were both filed in the cause of the State of West Virginia vs. Jesse R. Irwin and the said King appeared in said case by said Bill, and his said Counsel, Maynard F. *Styles*, and thereby became a party to said proceedings of the State of West Virginia vs. Jesse R. Irwin, and that the final decree entered in the cause of the State of West Virginia vs. Jesse R. Irwin confirming the sale to the said Stoddard and Hall was a final adjudication which is now un-reversed and un-appealed from and now in full force against the said Henry C. King and the State of West Virginia forever barring the said State of her right to sell the land or any part thereof described as "Exhibit Pomeroy Deed" as well as being a bar to the rights claimed by the said Henry C. King to redeem said land or any part thereof mentioned in "Exhibit Pomeroy Deed."

Petitioners further allege that on the 4th day of January, 1900, said W. H. Stoddard and Amos C. Hall conveyed the land mentioned in "Exhibit Pomeroy Deed" to Henry Patton and that he by his written declaration of trust held said land as trustee for the use and benefit of said W. H. Stoddard, Amos C. Hall, Henry Patton and Ole L. Snyder.

On the 4th day of January 1900 Emma Idelia Pomeroy, widow, conveyed said 20 000 acres of land described in "Exhibit Pomeroy Deed" Henry Patton, Trustee, and that said trustee held said land as trustee under said conveyance as stated above.

On the 1st day of April 1904 Henry Patton, Trustee, Wm. H. Stoddard, Ole L. Snyder and Amos C. Hall conveyed said land mentioned in said "Exhibit Pomeroy Deed" to said M. B. Mullins.

On the 18th of January, 1906, said M. B. Mullins departed this life intestate leaving as his sole heir at law Milton A. Mullins and his widow, the defendant, Mae Mullins.

On the 23rd day of October 1906 said Milton A. Mullins

conveyed said land to U. B. Buskirk, Trustee, all of which said deeds have heretofore been filed in this suit and are here referred to and made a part of this petition the same as if herein fully copied. The said U. B. Buskirk, Trustee, mentioned in the last conveyance above by a written declaration of trust holds said land in trust for the benefit of U. B. Buskirk, J. Cary Alderson, R. L. Shrewsbury and W. R. Lilly.

Possession.

Petitioners therefore say that they and those under whom they claim have been since 1887 down to the present time at all times in the actual, open, notorious, exclusive, hostile and adverse possession of said lands under the said deeds and decrees heretofore set out and for more specific specifications of their possession petitioners say:—

In the year 1887 Jesse R. Irwin, representing himself and his co-tenants as shown by deeds heretofore filed, leased to one Floyd Trent 300 acre of the land with the exterior lines of the said tract described in "Exhibit Pomeroy Deed" and outside of the lines of the exclusions herein referred to on Coal Branch of Elk Creek of Guyandotte River. That the said Floyd Trent as such tenant of the said Irwin and his co-tenants entered upon and took actual possession of said land and built a house, cleared a tract of about 10 acres of land; enclosed the same by fence, planted an orchard thereon; that said Trent continued to occupy said land to the year 1896 as the said tenant of the said Irwin his co-tenants and their grantee, Emma I. Pomeroy. That when Floyd Trent surrendered said possession to said Emma I. Pomeroy, Abner Brown as the tenant of said Emma I. Pomeroy entered and took possession of said premises and has occupied the same ever since as a tenant of the said Emma I. Pomeroy, Stoddard & Hall, Henry Patton, Trustee, M. B. Mullins, Milton A. Mullins and your petitioners; that the place where said Trent occupied said land is shown upon said map and marked "Trent House."

That in the year 1887 said Irwin likewise leased to M. G. Mitchell a portion of said land within the exterior boundary of said "Exhibit Pomeroy Deed" as well as within the exterior lines of the Robert Morris 500,000 acre grant,

after the making of the deeds aforesaid the portion so leased being on the Bear Branch of the Elk Creek as shown on the map as "M. G. Mitchell Place." That said M. G. Mitchell entered upon said land as the tenant of the said Jesse R. Irwin, and his co-tenants, that he cleared about 10 acres of ground enclosing the same by fence, planted out an orchard thereon, continued to occupy the same for a period of 15 years as the tenant of said Irwin and his associates in title, and his successors as before stated. That immediately upon said M. G. Mitchell moving from said place one Erastus Perry leased the same, immediately moved thereon and occupied the same for about a year as the tenant aforesaid when he moved off of said premises and one Clement Mitchell as the tenant of Stoddard & Hal' entered and took possession of said land and has continued to occupy the same ever since and to use and cultivate the fields thereon as tenant of the said Stoddard and Hall; Henry Patton, Trustee, M. B. Mullins; Milton A. Mullins and your petitioners.

On November 25, 1892, said Irwin leased to John P. Vance the following described portion of this Pomeroy tract, to-wit,

Beginning at the ridge above Polly's Hollow and running up said ridge to the top of the mountain, thence along said mountain to a point, thence down the mountain to John P. Vance's line opposite the school house below John P. Vance's, thence to the place of Beginning, Containing 200 acres, which is marked on said map as "John P. Vance Place." Said Vance, as the tenant of said Irwin and his co-tenants, entered upon said land so leased to him and occupied the same as the tenant of said Irwin, Pomeroy, Patton, Mullins and your petitioners.

In the year 1890 said Irwin representing himself and his co-tenants leased to one T. K. Tiller a portion of said land adjoining the lands of the said T. K. Tiller and shown upon said Map as T. K. Tiller field" and within the exterior boundary of the said Pomeroy tract and the said 500,000 patent and outside of the lines of said exclusions, and that said Tiller as the tenant of said Irwin and co-tenants entered into the possession of said land, cleared about 10 acres thereof and has continued to occupy

the same ever since said date until the present as the tenant of the parties aforesaid.

In the year 1889 Jesse R. Irwin representing himself and his co-tenants leased a portion of said land shown on the map as J. M. Vance filed, to J. M. Vance. Said J. M. Vance cleared about 5 acres of said land and has continued to cultivate and improve the said land ever since and has ever since been in the actual possession thereof as tenant thereof as tenant of the place aforesaid.

In the year 1900 Henry Patton Trustee, and his cestui qui trust, Stoddard & Hall, through their agents, leased a portion of this land shown on the map as "Erastus Perry's place" to said Erastus Perry and that said Erastus Perry as tenant of the said Henry Patton, Trustee, his cestui qui trust, and their successors in title, has continued to remain upon said land and cultivate the same from and including the year 1900 to the present time.

That in 1900 G. T. Christian leased from said Henry Patton, Trustee, and his cestui qui trust a portion of said land, marked on said map as "G. T. Christian field."

That the said G. T. Christian immediately entered upon said land and cleared up about five acres thereof and has continuously been using and cultivating said land ever since under and as tenant of the said Henry Patton, Trustee, his cestui qui trust and their successors in title.

That the said G. T. Christian field and the said Erastus Perry's place are both within the exterior boundary of the said Pomeroy tract and the 500,000 acres claimed by the said Henry C. King and that said Perry and Christian have as tenants of the said Patton, the said M. B. Mullins and Milton A. Mullins and your petitioners, been in the actual possession of said lands ever since and including the year 1900 to the present time.

Petitioners further say that they, Milton A. Mullins, M. B. Mullins and Henry Patton, Trustee, have at all times for the last seven years been in the actual, open, notorious, exclusive, hostile and adverse possession of said lands outside of the exclusions herein made and within the exterior boundary of the said Pomeroy tract first herein described and within the exterior bounds of the 500,000 acre grant sought to be sold in this cause by the State of West

Virginia and sought to be redeemed by the defendant, Henry C. King, W. K. Cowden, Trustee, R. L. Joyce, Trustee, et als. and that none of said parties seeking to redeem said lands or the State seeking to sell the same, have at any time been in the possession of said lands. That all taxes have been regularly assessed on said land and duly paid by your petitioners and their successors in title for each of the years 1899 1900 1901 1902 1903 1904 1905 and 1906 as will appear from the Auditor's certificate herewith filed marked "Auditor's Certificate."

Petitioners further say that at the time of their purchase of the land above described in the case of the State of West Virginia vs. Jesse R. Irwin and others and at all times since then, the 500,000 acres have been and is now forfeited to the State of West Virginia; that all the right title and interest to said grantee was in said State and that all the right, title and interest that was in the State of West Virginia at the date of said sale passed to and vested in the said Stoddard & Hall and is now owned by your petitioner by reason of said sale and the conveyances aforesaid.

Petitioners further say that all the right, title and interest to the DeWitt Clinton survey was likewise vested in the State by reason of its forfeitures and is now owned by your petitioners by reason of said sale and conveyances and the possession and payment of taxes as herein set out.

Petitioners further say that it has been adjudicated in this cause that the true boundary line of the 500,000 acres was located according to the purple colored lines shown upon the map heretofore filed in this case as a part of this petition; that the location of said line is more definitely shown by the survey made by—Maupin, a surveyor, and herewith filed as a part of this petition marked "Exhibit Proper Location of the 500,000 Acres" all of which has been adjudicated between the State, Henry C. King and your petitioners, successors in title, and is now a binding adjudication of the location of the location of said lines.

Petitioners further say that the said Henry C. King has no right, title or interest to any portion of the 500,000 Acres within the exterior boundaries of the tract of land described in "Exhibit Pomeroy Deed" on account of the defects hereinbefore pointed out to his chain of title filed in this

cause by defendants herein, and that the various parties claiming under DeWitt Clinton have no right to any land within the exterior boundaries of said "Exhibit Pomeroy Deed" against these petitioners.

The petitioners further deny each and every allegation of the plaintiff's bill and the answers of the defendants and petitioners of Henry C. King; the answer and petition of W. K. Cowden, Trustee, and R. L. Joyce, Trustee, et als., not herein specifically admitted, as well as every and all allegations set out in any other pleading filed by any party in this cause claiming said land herein first above described adverse to the title herein set out.

Petitioners further allege that each and all parties mentioned as defendants to this petition are claiming some interest in this land, except Mae Mullins, adverse to these petitioners, the exact extent and character of said claim further than herein stated is to the petitioners unknown, and that the said Mae Mullins has a certain dower interest herein as the widow of M. B. Mullins, dec'd.

Petitioners therefore pray that this their petition may be taken and treated as their answer to the several bills of complaint herein filed by the plaintiff, the answer and petition of Henry C. King, W. K. Cowden, Trustee, R. L. Joyce, Trustee, et al., and to pay any and all other pleadings claiming the land herein adverse to your petitioners.

Your petitioners further pray that inasmuch as by reason of the facts herein set out they have good title to the land herein first above mentioned and described and the State hath no title or right to proceed against the same and that no party has a right to redeem the same or any part thereof; that the lands herein described be dismissed from said suit, and for such other, further and general relief as the Court may see fit to grant.

And as in duty bound they will ever pray.

U. B. BUSKIRK, *Trustee.*

U. B. BUSKIRK,

J. CARY ALDERSON,

R. L. SHREWSBURY,

W. R. LILLY,

By Counsel.

FRANK COX,

LILLY & SHREWSBURY, *Sols.*

EXHIBIT NO. 10.

Demurrer and Answer of King to Amended Petition of Buskirk, et als.

In the Circuit Court of West Virginia for the County of Marion.

In Chancery.

State of West Virginia

vs.

Henry C. King. et als.

Demurrer and Answer of Henry C. King to the Amended Petition of U. B. Buskirk, Trustee; U. B. Buskirk, J. Cary Alderson, R. L. Shrewsbury and W. R. Lilly, against State of West Virginia, Henry C King and Others, Filed in the Above Entitled Cause.

To the Honorable John W. Mason, Judge of said Court:

Now comes the defendant, Henry C. King, and demurs to the amended petition of U. B. Buskirk, trustee, et als., for that the same is insufficient in law; and not waiving said demurrer but relying and insisting upon the same, this defendant, for answer to said petition, or so much thereof as he is advised it is material for him to answer, says.

1. That this defendant denies that said petitioners or any of them are the owners in fee simple or otherwise of the land mentioned or described in his paragraph "1st" of said petition, and stated to contain "20,000 acres, more or less," or that they have any interest therein or any right or valid claim thereto or to any part thereof; and denies that the map referred to as filed with said petition, correctly shows the exterior boundaries of said 20,000 acre tract, or the lands excluded therefrom, or the portion thereof embraced in the Morris 500,000 acre grant, and denies that there is or ever was any such tract as that described in said paragraph of said petition.

2. That this defendant denies that said petitioners, have, or that any of them has, such complete title as should prevent a redemption by this defendant of the land claimed by him, or as should prevent a sale thereof by the State, or any title whatever.

3. That this defendant admits that the Commonwealth

of Virginia by letters patent dated the 23rd day of March, 1795, granted unto Robert Morris a tract of land stated to contain 480,000 acres, but this defendant denies that said grant contained 480,000 acres of land, and upon information and belief avers that the same contained a much less quantity. And he denies that the said grant was not entered on the land books in any of the counties where the same was situated, or remained off said land books, or that the same was, on the 24th day of November, 1881, or at any time thereafter or at any time prior thereto, forfeited to the State of West Virginia for any cause whatever; and avers that said grant was duly entered upon the proper land books in Virginia and charged with taxes as long as the same existed as an entire grant, and its subdivision—were properly charged with taxes on the proper land books of Virginia and West Virginia after the said grant was partitioned, down to the year 1885, and to the present time, as hereinafter shown.

4. That this defendant admits that in 1881, W. B. McClure, Commissioner of School Lands of Wyoming County, instituted a proceeding for the purpose of selling said 480,000 acre grant, for a pretended forfeiture, which proceeding was entitled "W. B. McClure Commissioner of School Lands, V. The 480,000 Acres of Land formerly owned by Robert Morris and now claimed by Jesse R. Irwin," and that an order was entered therein referring said cause to William T. Sarver, who was a surveyor, as commissioner in chancery to ascertain the amount of taxes due upon said land, and to report the junior adverse titles thereto, and *authorizing* him to do such surveying as said Irwin might direct; but this defendant denies that said Sarver, under or in pursuance of said order or during the pendency of said proceedings or for the purpose of said proceeding, did any surveying of the exterior lines or other lines of said 480,000 acre grant or any lines supposed or purporting to be the lines thereof and denies that any lines of any kind that said Sarver at any time or for any purpose may have run if any, or trees or monuments that he may have marked upon said lines, if any, have at all or any time since then been recognized by the adjoining owners or by any other land owners, or have been known to the State of West Virginia through and by her commis-

sioners of school lands or otherwise, or by any one, as trees or monuments marking upon the ground or otherwise or elsewhere the exterior or other boundaries of said 480,000 acre grant, or of any part thereof, but this defendant avers that, on the contrary, the pretended resurvey of said grant, if any was made by said Sarver, has been disregarded, rejected and repudiated by the commissioners of school land and the courts of the state; and this defendant denies that any report or map whatever of any resurvey or *pretended* resurvey of said 480,000 acre grant by said Sarver was ever made to said court or filed in said proceeding.

5. That this defendant admits that said Sarver, as commissioner in chancery in said cause, made a report to said court on the 15th day of July, 1885, of the *estimated* quantity of land in the counties of Logan, Wyoming and McDowell, but said report was not made after nor based upon any resurvey or pretended resurvey of the said 480,000 acre grant or any lines thereof, and none had been made at that time, as appears from said report.

6. That this defendant admits that on said same July 15th, 1885, the report made by said commissioner Sarver was confirmed by the court, but neither said report nor the decree of confirmation thereof was "based upon said location" of said 480,000 acre grant, or upon any stated or disclosed location thereof; and admits that at the same day a pretended sale was made to said Irwin of said supposed portion of said 480,000 acre grant and that on the 25th of March, 1886, Commissioners McClure executed to Irwin a pretended deed, a copy of which filed in this cause will show for itself.

7. That this defendant admits that said Jesse R. Irwin on said March 25th, 1886, and immediately thereafter, made the sundry conveyances set out in said petition, and that some or all of them contained the statement that the description therein was "by map and survey of said tract made by Wm. T. Sarver under a decree of the Circuit Court of Wyoming County, West Virginia and filed in the Clerk's Office of said County, but said grant is described in said deed by the particular description and the natural and artificial monuments given in the letters patent therefor, and said deeds do not include any of the land claimed by the said petitioners, nor involved in this suit; and this defend-

and denies that any map or any report mentioned in said deed, or any map or report of any survey or pretended survey by Sarver of said grant was ever made to or filed in said circuit court in said cause or otherwise.

8. That this defendant admits that in the year 1889, Marie E. Hoyt, claiming some interest under the aforesaid deed of Irwin, brought a suit in the circuit court of the United States for the District of West Virginia, against W. B. McClure and U. H. Buskirk, commissioners of school lands, to restrain them from selling certain lands, and this defendant is informed and upon his information alleges that an account or description of a pretended survey by Wm. T. Sarver, as a resurvey of said 480,000 acre grant was fraudulently dressed up in the disguise of a report to the said Circuit Court for Wyoming County in said cause of McClure, Commissioner vs. 480,000 Acres &c., and was falsely and fraudulently made to masquerade in said United States court as a *veritable* report of an actual resurvey of said 480,000 acre grant, upon which a sale of said land had been made, and which had been approved and confirmed by said circuit court of Wyoming county, as said United States court was, by said fraud and contrivance, deceived and led to believe, when in truth and in fact said circuit court of Wyoming county had never acted upon, seen or heard of such Alleged report or survey. And this defendant says that neither this defendant nor the State of West Virginia, nor any party to this suit, except said Hoyt and said U. B. Buskirk as commissioner of school lands, was a party or is privy to the said suit by said Hoyt, nor bound nor in any way affected by any decree or adjudication therein; that as far as any decree therein might be deemed to be a decree against said State the same is void for want of judicial power in the United State or the courts thereof to make the State a defendant, or bind her by any decree in said cause, and that, so far as the injunction decree entered in said cause had or has any legal effect it prohibited and made invalid the pretended sale under which the said petitioners, Buskirk et als. now claim title herein.

10. That it may be true that on the 28th day of July, 1893, Jesse R. Irwin, Harris Hoyt, Marie E. Hoyt and Alvin Irwin and wife, executed to Emma Idalia Pomeroy

a pretended deed of which the petitioners file a copy herein; but this defendant denies that said parties conveyed thereby to said Pomeroy 20,000 acres of land, or any land or interest in land whatever, or had or owned any land or interest in land in the State of West Virginia.

11. That this defendant denies that any land whatever "according to said Sarver survey" was "entered for taxation upon the assessors' land books of Logan County" or upon any land books at any time in the names of Irwin, Hoyt, Thomas or any other person, but he admits that Jesse R. Irwin, Harris Hoyt, Marie E. Hoyt, Charles F. Thomas and Alvin Irwin were charged upon the land books of Logan county in 1887, and also in 1886, with 20,000 acres of land, and he avers that in 1888, the pretended title of said persons thereto was sold to the State for the unpaid taxes thereon, and the said land was never thereafter redeemed by any person. He denies that in 1892 20,000 acres were charged to the said persons with four years back taxes, and avers that said land was not chargeable with taxes in their names, the same having been sold to the State for taxes four years before that time, and he is informed and charges that, if at any time said land was entered and charged with four years back taxes, and if said taxes were paid, it was done by one Bruce McDonald, for purposes of his own and not by said Irwin, Pomeroy, Hoyt or Thomas. And he admits and charges that the land or claim to land charged in the name of said Pomeroy was sold to the State in 1894, and in 1895, and was never redeemed; and he avers that neither said Jesse R. Irwin, nor any of the persons claiming under him from 1885 down to 1900 ever paid any taxes on any land or claims to land in Logan or Mingo counties, or ever at any time redeemed any land claimed by them or any of them but that all said taxes were unpaid and all said sales for taxes went unredeemed and unreleased.

12. That this defendant admits that on the 17th day of June, 1897, J. W. Hinchman, commissioner of school lands of Logan county, caused a suit to be instituted in the circuit court for Logan county against the said Irwins, Pomeroy, Hoyt, Dunham and J. B. Wilkinson for the purpose of selling, as forfeited to the State, such interest in or claim of title to the land previously sold for taxes

as said persons might have, and such proceedings were therein had as are hereinafter stated and a pretended sale had, but not of any land now claimed by petitioners herein.

13. That this defendant admits that this defendant brought a suit in the United States circuit court for the district of West Virginia, in July, 1898, against the said Hinchman, as commissioner of school lands, to enjoin the sale of land in said suit of State v. Irwin et als., in the circumstances hereinafter described, and dismissed said suit after he learned that the land pretended to be sold was not situated within the 500,000 acre grant, and that said sale and deed made thereunder were void; but this defendant says that none of said petitioners was party to said suit of this defendant, or is privy thereto, and that the court adjudged nothing in said suit as to the right of the State of West Virginia to sell any land whatever nor determined any right of said State.

14. That this defendant denies that this defendant's bill against Hinchman, commissioner, was filed in the suit of State v. Irwin, et als, or that this defendant appeared therein or became a party thereto, at any time, or in any manner, or that the decree of sale or confirmation of sale rendered in the last mentioned suit, or any decree entered therein, had or has any force or effect whatever upon this defendant; or that said decree bars or in any way affects the right of said State to sell any land described or embraced within said "Exhibit Pomeroy Deed." And he says that no land described in or embraced within the boundaries of said Pomeroy deed was sold or conveyed in said proceedings; but the decree of sale therein, if of any validity whatever, which this defendant denies, is a conclusive and final adjudication against said Emma J. Pomeroy and all persons claiming under her, and in favor of the State; that whatever title or claim of title the said Pomeroy had in any land mentioned in the bill and proceedings in said cause was then forfeited and liable to sale for the benefit of the school fund, and that it still remains liable, so far as the said Pomeroy or any one claiming under her is concerned.

15. That it may be true that W. H. Stollard and Amos C. Hall on the 4th day of January, 1900, executed to Henry Patton a paper writing attempting to convey to him the land, or some land described, or which they attempted to

describe, in said writing; but this defendant denies that said writing or deed conveyed any land whatever, and he avers that the said Stoddard and Hall had not at that time or any other any title or color of title to any land described in said "Pomeroy deed".

16. That it may be that said Emma Idalia Pomeroy executed a pretended deed to said Patton attempting to convey 20,000 *acre* of land mentioned in said "Exhibit Pomeroy Deed," but this defendant denies that she conveyed thereby 20,000 acres or any other quantity of land or any title to or any interest in any land, and avers that said Pomeroy never derived or had any valid claim to any land in Logan County or Mingo County, and the decree in said cause of State v. Irwin et als, had extinguished any claim of title the said Pomeroy had to the land proceeded against in said suit.

17. That it may be true that on the 1st day of April, 1904 said Henry Patton, trustee, and said Stoddard and Hall and Ole L. Snyder executed a pretended deed to M. B. Mullins, attempting to convey to him such land as is described in said "Exhibit Pomeroy Deed," if any is therein described, which this defendant denies, but this defendant denies that said pretended deed passed title to any right or interest in any land whatever, or that the said Mullins ever acquired or had any valid claim to any of the land heretofore claimed by him herein and now claimed by said petitioners.

18. That this defendant admits that said M. B. Mullins has departed this life, but he has no knowledge what heirs at law he left surviving him or whether he died testate or intestate.

19. That this defendant is informed that Milton A. Mullins on or about the 23rd day of October, 1906, executed some sort of a pretended deed to said U. B. Buskirk, trustee, and that he has made a declaration of trust in favor of himself and three lawyers, Alderson, Shrewsbury and Lilly, combined with him in the enterprise; but this defendant denies that said deed or said declaration of trust conveyed any land whatever, or any title or right, or valid claim to any of said petitioners.

20. That this defendant denies that the said petitioners or any of them or any one under whom they claim or pre-

tend to claim have, from 1887 to the present time, had the actual, open, *notorious*, exclusive, hostile, adverse or other possession or any possession whatever of any land mentioned or described or attempted to be described in any of the alleged deeds or decrees mentioned in said amended petition as now claimed by them.

21. That this defendant denies that said Jesse R. Irwin, in 1887, made any lease to Floyd Trent, and says that if he did make any such lease, the said Irwin neither had any title or color of title to the land leased by him, nor acted for his "cotenants" or any other person than himself, or had any authority to do so, or had any "cotenants." He denies that said Trent ever entered upon or had any possession of any land except of the small amount cleared by him, if any, and denies that he occupied said land or any land as the tenant of said Irwin or of said Pomeroy, and denies that the said Trent ever surrendered possession to said Emma J. Pomeroy, and denies that Arthur Brown ever entered upon said land or occupied the same or any land as the tenant of said Pomeroy, Stoddard, Hall, Patton, trustee, Mullins or of said petitioners.

22. That this defendant denies that in the year 1887, or at any other time, said Jesse R. Irwin leased any land to M. G. Mitchell, or that Mitchell ever occupied said land as the tenant of said Irwin, or of any other person; and avers that said Mitchell claimed for himself all the land he occupied on Bear branch of Elk creek.

And he denies that said M. G. Mitchell or Erastus Perry or Clement Mitchell occupied the said "M. G. Mitchell place" or any other place as the tenant of Stoddard and Hall of either of them, or of Henry Patton, trustee, or of M. B. Mullins or Milton A. Mullins or of said petitioners, or was the tenant of any of the said persons, or in privity with them or in subordination to their pretense of title.

23. That this defendant has no knowledge whether or not said Jesse R. Irwin in 1892, or at any other time made any lease or pretended lease to John P. Vance but he denies that said Vance ever entered upon or occupied any land as the tenant of said Irwin, Pomeroy, Patton, Mullins or of said petitioners.

24. This defendant denies that at any time the said Irwin, acting for himself or for any one else, leased any land

to T. K. Tiller or J. M. Vance, or that the said Tiller or Vance ever occupied any land as the tenant of said Irwin or of said petitioners or of any person under whom they pretended to claim.

25. That this defendant denies that Henry Patton, trustee, and Stoddard & Hill, through their agent or otherwise, in 1900 or at any other time leased the so-called "Erastus Perry tract" to Erastus Perry, or that said Perry held, occupied or entered upon said land as a tenant of any of the said persons, and avers that J. B. Ellison who is claimed to have made some agreement with said Perry, had any legal authority to act in the premises.

26. That this defendant denies that G. T. Christian in 1900 or at any other time leased from Henry Patton, trustee, any land whatever, or ever was in the actual occupancy or possession of any land as the tenant of said Patton or said Mullins or of said petitioners.

27. That this defendant denies that Milton A. Mullins, M. B. Mullins, Henry Patton, trustee, or any other person except this defendant has at any time during the last seven years been in the actual, open, notorious, exclusive, hostile, adverse, or other possession of any of the lands claimed by said petitioners within the boundaries of said so-called "Pomeroy tract" and within the boundaries of the Mosris 500,000 acre tract or elsewhere.

28. That this defendant avers that the land claimed by the said petitioners within the pretended boundaries of the so-called "Pomeroy tract" or mentioned in said "Pomeroy deed," or any part thereof, has been regularly or otherwise assessed with taxes in the name of the proper owners for the years 1899, 1900, 1901, 1902, 1903, 1904 and 1905 or for any of said years, or that any taxes on said land for said years have been paid.

29. That this defendant denies that at the time of the pretended or attempted purchase made in said cause of State of West Virginia, vs. Jesse R. Irwin, or at any time since the formation of West Virginia as a separate State, the said 500,000 acre grant or any part thereof was or has been forfeited, or is now forfeited, or that any right, title or interest thereto or therein was vested in said State at the time of said alleged purchase by said Stoddard and

Hall in said suit, or is now vested in said petitioners or any of them.

30. That this defendant admits that all the right, title and interest in and to the DeWitt Clinton grant was and is vested by forfeiture in said State, except of that part which laps upon said 500,000 acre grant, but he denies the same is for any cause vested in or owned by said petitioners or any of them.

31. That this defendant denies that it has been adjudicated in this cause between said State, this defendant and said petitioners, that the true boundary line of said 500,000 acre grant is located according to the purple colored lines shown upon the map filed herein by said petitioners, and avers that as between the said State and said petitioners, who claim under the State and this defendant, it has been finally and conclusively adjudicated that the true boundaries of said 500,000 acre grant are as set out in the decree rendered and entered herein on the 30th day of September, 1897.

That this defendant denies that he has no right, title or interest in or to any portion of said 500,000 acre grant within the exterior boundaries of the tract of land described in "Exhibit Pomeroy Deed," because of defects in his claim of title, and denies that there are any defects in his claim of title or in his title; and avers that he and he only has good and valid legal and equitable title to all said land.

23. That this defendant denies each and every allegation of said petition not herein specifically admitted.

And for *further* and fuller *answer* to said petition, and for a better and true statement and understanding of the sham, spurious and fraudulent origin, nature and character of the pretended claim of said petitioners, this defendant doth further say:

24. That on the 13th day of March, 1797, the said Robert Morris, by deed of that date conveyed the 480,000 acre grant, patented to him as aforesaid, and also a 320,000 acre grant adjoining the same, also patented to said Morris, to William Cramond, who, on the 28th day of October, 1814, conveyed said two tracts to Thomas Astley. Said Astley died intestate in 1838, leaving a widow, Sarah W.

Astley, and one child and only one heir at law, Sophia A., then intermarried with Littleton Kirkpatrick.

The said widow and daughter of the said Littleton Kirkpatrick, on the 10th day of December, 1840, conveyed said two tracts to Henry Cramond. The said two tracts had been regularly entered upon the land books and properly charged with taxes prior to 1842 and had become forfeited for the non-payment thereof, and in 1842, George W. G. Prown, commissioner of forfeited and delinquent lands of Tazewell county, wherein said lands then lay, by proper proceedings in the circuit court of said county sold said two tracts to said William Cramond, but the said William having died intestate before the execution of a deed to him, leaving his widow, Sarah, and his children, Elizabeth, Ann, and Henry, his only heirs at law, the said commissioner pursuant to a decree of court conveyed said two tracts to said Sarah, Elizabeth, Ann and Henry Cramond on the 20th day of July, 1846, and the first three of said persons on the 5th day of November, 1846, conveyed all their interest therein to said Henry Cramond, who thereby became the owner of said two tracts.

On November 5, 1846, Cramond conveyed said tracts to Charles Fainour, Jr., and he conveyed 50,000 acres off the southern end of said 320,000 acres to Thomas Beck, November 26, 1846, and on March 1, 1847, conveyed the residue of said tract and all said 480,000 acres to John Herman. On April 27, 1847, Herman conveyed to Michael Bouvier an undivided 175,000 acres, and by subsequent deeds and judicial proceedings the said Bouvier acquired on Oct. 10th, 1852 all the residue of said grants except the 50,000 acres conveyed to Beck as aforesaid and later and now known as the "Max Lansburg 50,000 acres," all of which derivation of title by said Bouvier will more fully appear from copies of the deeds and proceedings under which he acquired said land, filed herein.

5 That said Bouvier had said grants resurveyed by Henry D. Harmon, according to which resurvey there appeared to be only 157,500 acres in them aside from the 50,000 acres conveyed off the 320,000 acre grant as aforesaid, and this 157,500 acres he divided up in 1852 or 1853 into one tract of 63,000 acres, one of 36,750 acres, one of 17,850 acres, two of 15,750 acres each, and one of 8400

acre, all of which separate tracts he conveyed to various persons as will be seen from copies of conveyances on file.

36. That said tracts of 63,000 and 36,750 acres embraced all of said 480,00 acre grant found to lie in the county of Wyoming, according to said Harmon survey, and from 1881 to 1885, inclusive, and earlier and later said 63,000 acre tract was owned by Philip A. Trimble and J. B. Kimes, 52,400 acres by the former, and 10,600 acres by the latter, the whole tract being now owned by J. O. Cole and C. Crane; and from 1875 to 1885, inclusive, and later said 36,750 acre tract was owned by Francis Lasher.

37. That said 480,000 acre grant was never forfeited for any cause after 1842, but was delinquent in the name of William Cramond in 1848 and in the name of John Herman in 1849, and was redeemed by them, as will appear from copies of redemption receipts certified by the Auditor of Public Accounts of Virginia, on file herein; and said subdivisions thereof situated in Wyoming county were properly charged with taxes to the proper owners thereof from the time of said subdivision until after the alleged and pretended sale of said 480,000 acre grant to Jesse R. Irwin in said proceeding in the circuit court of Wyoming county, and all said taxes were duly paid, as will appear from the certificate of the Auditor of West Virginia, dated December 31, 1906 and filed herein.

38. That in 1881, and long prior thereto, said 480,000 acre grant had ceased to exist, as an integral tract, and said 63,000 acres and 36,750 acres were then charged with taxes on the land books of Wyoming county and all previous taxes chagreable thereon had been paid and no part of said grant was vested in said state or was subjected to proceedings by the state or the commissioner of school lands; in which condition of affairs Jesse R. Irwin, who laid claim to some interest in said grant under a forged and bogus deed from Michael Bouvier, or purporting to be a deed from said Bouvier for said entire grant, instigated the aforesaid proceeding of McClure v. 480,000 acres "formerly owned by Robert Morris," and then "claimed by Jesse R. Irwin," for the purpose of selling said grant as forfeited for non-entry upon the land books in the names of the heirs of Robert Morris, and before the pretended sale to Irwin in 1885, the said commissioner sold a number of

small parcels situated within said 36,000 acre tract and made deeds therefor.

39. That in June, 1890, Francis Lasher and others, then owners of said 36,750 acre tract, brought a suit in the United States circuit court for the district of West Virginia against L. B. Cook, John W. McCreary, Jesse R. Irwin, Alvin Irwin, Marie T. Hoyt, C. F. Thomas and sundry others, for the purpose of setting aside the said sales made by said commissioner of portions of said 36,750 acres, upon the grounds that said land so sold was owned by complainants and not by the State of West Virginia, and was not subject to sale when said proceeding was instituted and said sales made; and in the bill in said cause the connection of Irwin with said 480,000 acre grant is stated in the following terms, which this defendant upon information and belief alleges to be true and adopt as an allegation of this answer, to-wit: "Your orators now further allege that the defendant, Jesse R. Irwin, claims to have derived title to said 480,000 acre grant from a deed alleged to have been made by said Michael Bouvier to Henry L. Morris, bearing date the 21st day of February, 1866, but which deed, as your orators are informed and believe, and so charge was a forgery out and out; that Michael Bouvier never signed, sealed and acknowledged the same, and never saw, knew or heard of it, and the said alleged deed was never recorded in this state, and the said Michael Bouvier had sold and conveyed away the entire 480,000 acre tract, and all of the 320,000 acre tract he had ever owned, except the aforesaid 8400 acres tract, long before the alleged deed to Morris was executed." Irwin never denied this allegation. The said sales were declared and decreed to be null and void and were set aside as clouds upon the complainants' title, and the whole proceeding was declared to be without legal foundation and to be a nullity, and upon appeal to the United States circuit court of appeals for the 4th circuit the said decree was affirmed (*Cook v. Lasher*, 73 Fed., 701); and this defendant adopts, as an allegation of this answer, the following extract from the opinion of district Judge Jackson, which was quoted and adopted by said appellate court as its opinion in said cause to-wit:

"At the threshold of this investigation we are met with the fact that Robert Morris had conveyed away all his in-

terest in the two tracts long before the institution of these proceedings. In fact the plaintiffs claim under the deed made by Robert Morris to Wm. Cramond, in 1797, more than 80 years before the commissioner instituted his proceedings. This statement of facts put at rest the right of the State, through her commissioner of school lands, to move against these lands. The title to them had passed out of Morris, and he was no longer chargeable with them for taxes on them after their alienation by him.

From all that appears in this case the lands in the name of others had all been charged with and taxes paid. It does appear that so far as the tract in controversy is concerned, the plaintiffs and those under whom they claim, have been assessed and paid all their taxes on their lands from 1847 down to the institution of this suit, except 1869, and three years during the war when no taxes were assessed against the land. What *right*, then, had the commissioner to proceed against the Morris land? I answer, none, whatever. The lands in the name of Morris having been long before transferred to others, they were not liable to entry in his name, nor had the State any legal claim against them for taxes assessed in his name. The action of the commissioner was based upon the facts supposed to exist, but for which, in reality, there was no foundation, and, as a consequence, was illegal and with no binding effect upon those who claimed the lands under those who had acquired the title thereto more than 80 years before. We must, therefore, hold that these proceedings were coram non judice, and that the decree of the court declaring the forfeiture was void.

40. That in said same suit or proceeding by said Commissioner McClure and after the sale of the parcels involved in said suit of Lasher v. Cook and others, said commissioner made a pretended sale to Jesse R. Irwin of an *undescribed*, unascertained and unascertainable 40,000 acres of said 480,000 acre grant, at private sale and without previous notice, and on the same day the sale was confirmed by a decree which directed a deed to be made for the said tract of 480,000 acres of land, reserving in said conveyance all junior claimants protected by the Constitution and laws of the State, and also reserving therein all lands therefore sold by commissioner of school lands of either the counties of Logan, McDowell or Wyoming," and

on the 25th day of March, 1886, some eight or nine months after said sale, said commissioner of school lands executed to said Irwin a purported deed for said grant, a copy of which has been filed herein by said Stoddard & Hall, and which deed follows, in the description of said 480,000 acre grant, the description and bounds thereof contained in the original patent and survey of said grant, copies of which are on file herein, and excepts and reserves therefrom "all junior claimants and patents protected by the Constitution and laws of this State."

41. That said 480,000 acre grant, and the 500,000 acre grant which is involved in this suit are contiguous tracts, surveyed by the same surveyor and granted to the same Robert Morris, and having two corners and the line between them common to both tracts, said line forming the western boundary of the former and the eastern boundary of the latter tract, so that no conflict, interlock or overlap between said two tracts exist. And the circuit court of Wyoming county, by a decree entered herein September 30, 1897, and this court by decree entered herein on December 6, 1905, the said Stoddard and Hall and Mullins and Patton, trustee, under whom the petitioners claim, being parties thereto, established that beginning corner of said 500,000 acre grant, known as the "Muzzle corner," is the beginning corner of the western line and boundary of the 480,000 acre tract, and that the northeastern corner of said 500,000 acre grant is the northwestern corner of said 480,000 acre tract, and that the said two tracts lie wholly upon opposite sides of the same common line, and not one tract upon the other.

42. That all taxes on said 500,000 acre grant up to 1884 had been paid, and said grant was not, nor was any part thereof, forfeited, nor had it been sold for taxes thereafter, nor was it for any cause liable to sale by said State, or by the said commissioner of school lands, or to be proceeded against by either of them, either when said pretended sale of said 80,000 acre tract to Irwin was made in 1885, or when the deed was executed in 1886, nor did the State of West Virginia have or claim any title thereto or interest therein; and if said 480,000 acre tract, or said deed from McClure to Irwin, by any construction or for any purpose, be held to include the lands claimed by this defendant or any part of

said 500,000 acre grant, which is junior to said 480,000 acre grant, then the said 500,000 acre grant is a "junior patent protected by the Constitution and laws of this State" from sale by the State and is carved out of said 480,000 acre tract and said deed, and reserved and excepted from said pretended sale and conveyance to Irwin and did not pass nor purport to pass through him thereby, and said deed gave to said Irwin and those claiming under him no title, color of title, or basis for claim of title to any portion of said 500,000 acre tract and the forfeiture or sale for taxes in the name of Irwin or his assigns of all or any part of the land that said deed purported to convey and not except or reserve, could not and did not give title or claim of title to said State to any part of said 500,000 acre grant, or to any other land reserved and not conveyed by said deed to Irwin.

43. That during the year 1886 said Irwin executed sundry deeds purporting to convey away all said 480,000 acre tract by the metes and bounds of the original grant an undivided $\frac{1}{4}$ to Alvin Irwin, an undivided $\frac{1}{4}$ to Harris Hoyt (who conveyed the same to Sumner T. Dunham, who conveyed it to Marie E. Hoyt) and an undivided $\frac{1}{4}$ by two separate deeds, to C. F. Thomas; copies of which deeds are herein filed marked "Exhibit Irwin No. 1, Irwin No. 2, Irwin No. 3, Irwin No. 4." That year Harris Hoyt, Jesse R. Irwin, Alvin Irwin and C. F. Thomas were each charged with taxes on 5000 acres of land, "part of 20,000 acres," and the same was sold for taxes to the State in 1888, and never at any time redeemed by any one.

44. That notwithstanding the said sale to the State, and notwithstanding the nullity of the original sale and deed to Irwin and of the whole proceeding leading up to it, which gave Irwin no right to any land whatever, neither within nor without said 480,000 acre grant, and notwithstanding said deed professed to convey to Irwin only 20,000 acres in Logan county, unlocated and without description or means of identification, the said Irwin, in spite of his former conveyances, together with Harris Hoyt and Marie Hoyt, his wife, and Alvin Irwin and his wife, none of whom had any pretense of title to any land in West Virginia, except under said deed from McClure to Irwin, in July, 1893, made the said pretended conveyance to Emma I. Pomeroy of a boun-

dary of land north and east of Guyandotte river in Logan county, lying principally or wholly outside of said 480,000 acre grant and chiefly within said 500,000 acre grant, but purporting to run with certain lines of the "Sarver survey of the 480,000 acre Morris grant," and to contain "20,000 acres, more or less, after deducting all legal junior grants and school sales." The said Morris 500,000 acre grant was junior in point of time to said 480,000 acre grant, and was a "legal junior grant." Said deed embraced about 24,000 acres, or more, of land, exclusive of "school sales," and junior patents other than the 500,000 acre grant, and a very much greater area all told.

45. That, although no title to any land whatever passed by said deed, the said Pomeroy was charged with taxes upon 20,000 acres of land on the land books of Logan county, for 1893 and 1894, and Alvin Irwin and Marie E. Hoyt were charged with a like quantity in said county for the same years, and both supposed tracts were sold to the State for delinquent taxes in 1895 and neither was ever redeemed by any one.

46. That none of said persons at any time had any title to said land or to any land within the Morris 500,000 acre tract, or in Logan county, and the whole process and operation of charging taxes to said Pomeroy, Irwin or Hoyt and going through the formula of a tax sale was vain, futile and ineffectual, and gave the State of West Virginia no title, or right to claim title, to any land whatever, or to sell or attempt to sell any through her courts or otherwise.

47. That while this present suit was pending and undetermined in the circuit court of Wyoming county, to-wit, on the 3rd day of May, 1897, Joseph W. Hinchman, commissioner of school lands for Logan county, presented to and filed in the circuit court of said county his report of lands deemed liable to be sold under Chapter 105 of the Code, among which were:

"Tract No. 42, containing 200,000 acres forfeited in the name of Alvin Irwin and Maria E. Hoyt.

"Tract No. 43, containing 20,000 acres forfeited in the name of Emma J. Pomeroy, and being the same tract forfeited in the year 1893, in the name of Alvin Irwin and Marie E. Hoyt and described in this report as tract No. 42."

And on the first Monday in July, 1897, the State brought a chancery suit, entitled State of West Virginia v. Jesse R. Irwin et als., in said circuit court for Logan county, for the stated purpose of selling for the benefit of the school fund the said "tract No. 42, containing 20,000 acres, forfeited in the name of Alvin Irwin and defendant Marie E. Hoyt, for the non-payment of the taxes due thereon for the year 1893," and "Tract No. 43, in said report (of Hinchman) containing 20,000 acres, and forfeited in the name of Emma J. Pomeroy for the nonpayment of taxes due thereon for the year 1893," and not to sell any other land whatever; and no other land was mentioned in the bill, nor was said land mentioned or described otherwise than as here last quoted.

48. That subsequently, to wit, on the 29th day of April, 1898, a decree of sale was entered in said cause whereby the commissioner of school lands was directed to sell "the lands in the plaintiff's bill mentioned," said lands not being otherwise described or identified unless Jesse R. Irwin and Emma J. Pomeroy should within a certain time pay a certain sum of money in redemption thereof; and afterwards said commissioner made report to the court that pursuant to the decree last aforesaid he had sold to W. H. Stoddard and Amos C. Hall "the following real estate in the bill and proceeding in said cause mentioned, to-wit, Being all the real estate in the bill and proceedings mentioned and described, situate, lying and being— Triadelphia *dis- ar-ct* in this County (Logan) and Stafford District in Mingo County, West Virginia, except that portion of said real estate, if any, included in the DeWitt Clinton survey, and all timber standing and being on said lands formerly sold to and branded by the Little Kanawha Lumber Company, a corporation;" whereupon, on the 3rd day of November, 1898, the court entered its decree approving said sale and appointing J. B. Wilkinson a special commissioner to execute to the purchaser, "a proper and apt deed to the real estate so sold."

49. That said real estate was nowhere described in said "proceedings," otherwise than in said bill, nor did said commissioner of school lands pretend to *-ave* sold anything more than was mentioned in said bill, nor did said decree purport to authorize the execution of any deed or attempted

conveyance of any more, different or other real estate than that mentioned in said bill; nevertheless the said special commissioner Wilkinson executed a deed purporting to convey to said Stoddard and Hall "all that portion of said 480,000 acre survey, situate, lying and being in the county of Mingo," subject to various exceptions, meaning thereby the 480,000 acre tract granted to Robert Morris, in March, 1795, adopting the description of the original grant, some of the corner trees of which at well and long established corners were then and are still standing.

50. That this defendant is advised and doth aver that the said deed from Wilkinson, commissioner, to Stoddard and Hall, in addition to other causes of invalidity and annulity, is void for patent ambiguity, but whatever land said deed attempts to convey is to be found within the true boundaries of said 480,000 acre grant, and not within the 500,000 acre grant: yet the said Stoddard and Hall and the said Buskirk and his co-petitioners, abandoning the well-known monuments, abutments, corners, and bounds mentioned in deed, contend for a location of said deed and grant that embraces instead of 20,000 acres in what was Logan county in 1886, more *than* 200,000 acres, and that, instead of placing said grant alongside of the said 500,000 acres, as located by this court, extends it over the same and envelops nearly all that portion thereof that is in West Virginia.

51. That said contention is based upon the unfounded claim that said 480,000 acre grant, or so much of it as the deed purports to convey, was sold by Commissioner McClure to Irwin, or by Commissioner Wilkinson, to Stoddard and Hall, or in both cases, by and according to the "Sarver survey," which is a pretended survey of said 480,000 acre grant, claimed to have been made by Wm. T. Sarver for said Jesse R. Irwin, but which departs from all the actual lines, corners, monuments and boundaries of said grant, and embraces entirely different territory, and overlaps not only the said 500,000 acre grant, but the older and superior grant of 150,000 acres to David *Patterson*, 300,000 acres to said Nicholas, and said 320,000 acres to said Robert Morris which was surveyed for Morris Jacob Kenny, with all which grants said 480,000 acre grant is declared in the survey and patent and in the deeds to Irwin and to Stoddard

and Hall to run and be bounded.

52. That said so called sale and deed to Irwin was not made according to, or with any reference to, any survey by said Sarver, and was not intended to, and did not, include any portion of said 500,000 acre grant or said other grants. The said proceeding against said 480,000 acre grant did not purport to relate to said 500,000 acre grant, which is referred to in the petition of said McClure, commissioner, in giving the location and bounds of said 480,000 acre tract, as an adjacent and separate tract of land; and the said commissioner did not make "R. E. Randall, trustee, and A. D. Mauperpuis's heirs," mentioned in said petition as the claimants of said—adjacent of said 500,000 acre tract, parties to said proceeding at any time, but on the contrary, at about the same time instituted a separate and independent proceeding against them and the said 500,000 acre grant, in which proceeding said Randall redeemed said grant two years before the pretended sale of the 480,000 acre tract to Irwin.

53. That said Sarver was, indeed, upon the petition of Irwin, appointed a commissioner to do such surveying as Irwin might direct, and to ascertain the amount of interest, costs and taxes due upon said 480,000 acre tract, and to ascertain the amount of junior and other adverse titles in said survey, to which the owners had legal title, and to report all said matters to said court; and on the 15th day of July, 1885, said Sarver presented to the court the only report made by him in said cause, in which he reported that he had been unable fully to execute the decree of reference but he reported the amount of taxes, etc., based upon data obtained by Commissioner Lacy in the case of "W. B. McClure, commissioner, etc. v. a 500,000 acre grant claimed by other parties," and estimated the amount of unprotected land "in said 480,000 acre tract in the several counties, to be 20,000 acres in Logan, 10,000 acres in Wyoming and 10,000 acres in McDowell;" but in what portion of said counties or of said grant the said lands were supposed to be was not stated.

"And as to the amounts of land in the different counties," said commissioner Sarver, "there may be more and there may be less; but until work is completed it is not possible to ascertain the true amount of land in the different counties." Said report contained no reference to any

surveying, and no report, map or field notes of any survey was filed in said cause or in any manner mentioned or brought to the attention or knowledge of the court; and if any surveying had then been done it had not been completed, and was not known to the court by anything appearing in the record of said proceeding, nor made the basis of any action in the case. On the same day that said report was presented and filed said sale to Irwin was made and the deed directed to be executed; and if what is now called by the petitioners the "Sarver Survey" was exhibited to or brought to the knowledge of said McClure when or before said deed to Irwin—made *made*, the same was not adopted or followed in the making of said deed, but was rejected and repudiated, and said deed was made according to the original survey of said grant in 1794, as aforesaid.

54. That in said cause of State of West Virginia v. Irwin et als., in Logan County, no map, report, field notes or other data or evidence of said so-called "Sarver Survey" or other survey was filed or introduced in evidence, nor was any reference to such survey anywhere made in said proceedings, nor was any paper of any kind from which any possible description of any land whatever, by which the same could be identified, put in evidence or brought into the case in any way prior to the pretended sale therein and the execution of the deed from Wilkinson, commissioner, to Stoddard and Hall; and although said Wilkinson well knew of the so-called Sarver survey and what the same was and what it was supposed to embrace, he did not adopt nor follow the same, nor make any reference thereto in said deed to Stoddard and Hall, but rejected and repudiated the same, and in the description of said grant, within which the land intended to be conveyed was contained, followed the calls given in the original grant, and neither the pretended sale nor the conveyance in said cause, or was intended to be, in accordance with, or with any regard to, said "Sarver Survey."

55. The said Wilkinson, commissioner, was only authorized by decree of confirmation of sale to convey the lands sold, which was "the land in the bill and proceedings mentioned" which was undescribed and indefinable 20,000 acres but the deed executed by him to Stoddard and Hall purports

to convey, if anything more, other, and different land, and not land, mentioned in the bill and proceedings, nor proceeded against nor brought before the court, and said deed is unauthorized and void for that reason, and is not "a proper and apt deed."

56. That this defendant was not as heretofore stated, made a party to said suit of State v. Irwin et als., and had no knowledge or information of the pendency of the same until long after the entry of said decree of sale and the adjournment of the court for the terms at which the same was entered. The only persons made defendants were Jesse R. Irwin, Harris Hoyt, Charles F. Thomas, Mary Irwin, Virginia Irwin, Ethel Irwin, Alvin Irwin, Marie E. Hoyt, Emma Pomeroy and J. B. Wilkinson, and the plaintiff in her bill alleged that "all the persons known to the plaintiff to be former owners of said two tracts of land above set out and herein proceeded against at the time of the forfeiture thereof, and all persons in whose name the same was forfeited, so far as known to the plaintiff, as well as all persons claiming title to or interest in said lands, so far as known to the plaintiff, have been made parties defendants herein"; meaning by "said two tracts of land" tracts Nos. 42 and 43 mentioned in said bill.

57. That J. W. Hinchman, the commissioner of school lands who reported said land for sale, and the counsel for the State who brought and prosecuted said suit, and the said J. B. Wilkinson, defendant therein and special commissioner who executed said deed, well know of the pendency of this suit, and well knew what was the claim of this defendant in the Morris 500,000 acre grant and his contention as to its location, and knew that the 480,000 acre grant lies east of and outside the same; and either the said State did not assert claim in said suit to any of said 500,000 acre grant, nor intend to sell any part thereof, or said State and her counsel and said commissioners meant to conceal from this defendant the pendency of this cause, and to conceal from the court the interest of this defendant in said land, and the prior institution and pendency of this cause, in order that this defendant should not become a party to said cause of State v. Irwin et als., so as to protect such interest as he might have therein, and so that said court of Logan County might improperly entertain jurisdiction of said suit,

if the same was intended to affect any portion of said 500,000 acre grant.

58. That when this defendant's counsel, Maynard F. Stiles, saw a notice of a proposed sale in said cause, decree of sale having been entered and the court having adjourned, being of opinion that, by reason of the prior institution of this cause, and of the decrees at that time already entered herein, and for other reasons, the said decree of sale of said circuit court of Logan county was void, so far as such suit might in any way affect any part of said 500,000 acre tract and that the said commissioner of school lands was without any valid authority to sell the lands mentioned in said notice, which from the vague, general description appeared possibly to conflict with this defendant's grant, and because of what said counsel knew of the previous claims of said Irwin, said counsel filed a bill in the name of this defendant, who was then a citizen of the State of New York against said Hinchman, commissioner of school lands, in the circuit court of the United States for the district of West Virginia, and said court awarded and issued a temporary injunction, restraining said commissioner from selling said lands until the further—of the court, and a rule to said Hinchman to show cause why said injunction should not be made perpetual, which injunction and rule were served upon said Hinchman.

59. That upon the service of said injunction said Hinchman adjourned said sale, and reported the matter of said injunction to the said circuit court of Logan county and on the 3rd day of August, 1898, that court issued a rule against this defendant's said counsel to appear before it on the 1st day of its next regular term to show cause why he should—be fined and imprisoned as for contempt of said court in suing out said injunction, and at the same time ordered said Hinchman to proceed with said sale, which he did.

60. That pursuant to said rule this defendant's said counsel appeared before said court on the first day of said next term thereof to purge himself of said alleged contempt, and made his defense to said rule, whereupon said court adjudged and declared said counsel to be in contempt of said court, and committed him to the jail of said county until he should dismiss said suit, instituted and then pending in

said United States circuit court, and should dissolve said injunction; and said counsel having no power to dismiss said suit or to dissolve said injunction, except by an order of said United States circuit court, then sitting 150 miles away, if said court should see fit to enter such order in the circumstances, was obliged to submit to imprisonment, and was imprisoned and confined in the jail of said county of Logan for about ten days and until he could procure his release upon a writ of habeas corpus issued from said United States court. Immediately after the incarceration of this defendant's counsel, as aforesaid, and while he was confined in said Logan county jail, said sale was confirmed and said court adjourned for the term. Copies of the orders and decrees of said circuit court of Logan county in said alleged contempt proceedings are filed herein and made part hereof. After said sale and deed had been made and the whole purpose of said suit accomplished, and said injunction defeated, said Hinchman filed an answer in said United States Court, and, the said deed being seen not to embrace any of said 500,000 acres, this defendant on his own motion dismissed said suit.

61. That at the time of the making and confirmation of said sale this defendant was a resident of the State of New York, and absent from the State of West Virginia, and the said Stiles was the sole attorney, counsel, solicitor and representative of this defendant in said State of West Virginia, and the unlawful imprisonment of said counsel and the prompt confirmation of said sale made it impossible for this defendant to file any petition in said cause of State of West Virginia v. Irwin et als, or to take any other steps therein before said sale and confirmation, and said court did not direct that this defendant be made a defendant in said suit, nor did the State cause the same to be done.

62. That the deed executed in pretended pursuance of said decree of confirmation does not, this defendant contends, embraces or purports to convey any land within the Morris 500,000 acre grant, as located either by the decree of September 30, 1897, or the decree of December 6, 1905, entered herein, but if said suit was intended to affect any of said land, the same was fraudulently instituted and conducted; and if said sale and deed do embrace any of said

land claimed by this defendant and do purport to convey the same away from said defendant, then this defendant is advised and doth contend and allege that the said decree and action of the said circuit court of Logan county and of the plaintiff in said cause, State of West Virginia, deprive this defendant of property without due process of law, and in contravention of the Constitution of the State of West Virginia, and of Section 1, Article 14 of the Amendments to the Constitution of the United States.

63. That prior to the institution of said suit of State of West Virginia v. Irwin, this suit had been instituted against the defendants therein, except defendant Wilkinson, and was then pending, as aforesaid, and before said sale or decree of sale of April 29, 1898, had been made, it had been decreed and adjudged herein by the decree of September 30, 1897, that this defendant had the right to redeem said Morris grant according to the boundaries therein set out in said decree, so far as the title of said land was vested in said State, and that he had by said decree redeemed the same, which decree at the same time located the said 480,000 acre grant entirely to the east of and outside of said 500,000 acre tract, and this defendant had paid to said State because of said decree, the day the same was entered, and on account of the claim of the said State for the taxes on said land and the cost of said suit, the sum of \$3,090.08, which sum said State received and appropriated to her own uses and still retains, and said decree ordered that no part of said land be sold by or on behalf of said State; and said decree was in full force and effect, in reserved, unmodified and unappealed from when said decree of sale in said circuit court of Logan county was entered and when said sale was made, and was binding and conclusive upon said State and said court, and upon all the parties thereto, and said decree never has been reversed or modified, so far as it decreed that this defendant had the right to redeem the land therein described and that the other defendants to said suit had no right, title or interest therein, or any right to redeem the same, and prohibited the State from selling said land; but the right of this defendant to redeem the same by proper proceedings in this cause was affirmed, announced and declared upon appeal by said State; and said decree

has at all times since said 30th of September, 1897, been a conclusive adjudication of the right of this defendant to redeem said land and of the want of the right of said State to sell, in this or in any other suit, any part of said land that this defendant desired to redeem, which decree and adjudication has at all times been and now is binding upon said State and all persons claiming any right through or under said State or *through* or under any party to said suit since the institution of this suit in 1894, and especially since the rendition of said decree in 1897; and if said purported sale and deed to said Stoddard and Hall embraced or be held to embrace any part of said 500,000 acre grant, which this defendant denies, then said sale and deed are null and void because contrary to said decree, aside from other causes of invalidity.

64. That the said Irwins and Hoyts never had any title or color of title to any land included within the boundaries of their deed to Emma I. Pomeroy, made in 1893, and whatever claim of title to any land that they may ever have had under the deed from McClure to Irwin had been extinguished by the sale to the State in 1888, or by forfeiture for non-charging of taxes for five years prior to 1893. The charging of any land to said Pomeroy and the entering of any land upon the land books in her name were unauthorized, but if of any legal effect, the said charging with taxes and sale therefor, or the subsequent noncharging, "drowned" and extinguished all claim of title that the said Pomeroy may have had or made under said deed to her; and the proceedings and decrees against her in said suit of State v. Irwins et als., if said proceedings be of any legal validity, barred her and bar all persons claiming under her since said suit of all right to assert any claim whatever, except to redeem such title as the said Pomeroy had before said sale or forfeiture and not conveyed by said deed from said Wilkinson, commissioner, to said Stoddard and Hall, if any.

65. That the said Pomeroy has never been charged with any taxes on any land in Logan or Mingo counties since the sale in her name in 1895. Stoddard and Hall were first charged with taxes in 1899, being charged that year with taxes in Logan county on 16,000 acres only, described upon said land books in the column for explanations "from

whom, when and how the owner derived the lot of land," as "conveyed from commissioner of school lands."

They were charged in 1900, 1901, and 1903, with the same land and no more, and were not charged at all in 1902, nor 1904, nor thereafter. The commissioner of school lands never conveyed to said Stoddard and Hall any of the land claimed by said petitioners and described in their petition and which they call "Pomeroy land," and none of said land was charged with taxes in the name of Stoddard and Hall, or either of them, or of any one else under whom said petitioners claim. Said Stoddard and Hall were charged on the land books of Mingo county with an undescribed 2,000 acres and with no other land for the years 1899, 1900 and 1901, only. They were not, nor was either of them, charged with taxes on any land after 1903.

66. That Henry Patton, trustee, the first person after Emma I. Pomeroy to have a deed for any of the land embraced in the deed to her, was first charged upon the land books of Logan county in 1904, in which year he was charged with taxes on 16,000 acres, and no more, and he is declared by said land books to have acquired said land, so charged to him, from Stoddard and Hall. The pretended deed from said Pomeroy to Patton purports to have been executed in 1900, but the same was not recorded until 1903, and no land has ever been entered upon the land books or any taxes paid under said deed, or under the pretended Pomeroy title, nor upon the pretended "Pomeroy land" prior to 1905 or 1906, if at all.

67. That all the claims of title of said petitioners have arisen during the pendency of this suit, and have been derived from parties thereto and if any taxes have been paid upon any of the land claimed by said petitioners, which this defendant does not admit, such payment has been made since 1904, and while this defendant and the person making the same or the one or ones under whom such person claims were in actual controversy herein, and while this defendant was ready, willing and offering to pay any taxes that were chargeable against him upon the land claimed by him, and was urging the court to determine the amount of the same, and striving for an opportunity to pay the same, and long after this defendant had paid to the State herein

the said sum of \$3,090.08 as aforesaid, which was applicable upon the land claimed by said petitioners.

68. That this defendant is advised, and doth contend and aver, that section 6 of chapter 105 of the Code of West Virginia, under which he is informed said petitioners claim some right, or upon which they rely, is in contravention of the Constitution of the State of West Virginia, and of Article 1, Section X, I, of the Constitution of the United States, and of Sec. 1, Article 14 of the Amendments thereof; and that Section 3, Article 13 of said State Constitution, upon which this defendant is informed that said petitioners base some right or claim, is also in contravention of said Sec. 1, Article 14 of the Amendments to said Constitution of the United States.

69. That this defendant has had the actual, open, notorious, continuous, exclusive possession adverse to said petitioners and all the world of all the land claimed by them in said petition within the boundaries of said Morris grant ever since 1894: and this defendant has good and valid title and claim, legal and equitable, to all said land and to all the land claimed by him in his amended petition heretofore filed herein, and in support of said title he hereby refers to his answer to the original and first four amended bills of the State herein, and to all the title papers filed by him herein, and makes the same part of this answer. And he avers and charges that said Buskirk, trustee, and his copetitioners have no title or valid claim, either in law or in equity, to any part of the land claimed by this defendant.

This defendant therefore prays that the court adjudge and decree that the said petitioners have no valid title nor any right at law or in equity to any of the land claimed by this defendant in this suit, nor any right to redeem the same or any part thereof, or other right herein, and that said petition of said U. B. Buskirk, trustee, et als., be dismissed.

HENRY C. KING,
By MAYNARD F. STILES,
Of Counsel.

*Buskirk's Exceptions to Commissioners Reports.
In Chancery.*

State of West Virginia

vs.

Henry C. King & Others.

The petitioners U. B. Buskirk, Trustee and others except to the several reports of John T. Graham, Commissioner, heretofore filed in this cause, in so far as said reports have not heretofore been set aside, and in so far as they relate to and in any wise affect the lands claimed by your petitioners and mentioned and described in their last amended petition because the findings of said commissioner in said reports contained, in so far as they relate to the said lands claimed by your petitioners are without evidence to support them and are contrary to the plain preponderance of the evidence and contrary to the law, under the facts and evidence presented, and because the findings of said commissioner are without authority under the statute in such cases made and provided, and for other reasons appearing upon the face of said reports.

U. B. BUSKIRK, *Trustee.*

U. B. BUSKIRK,

J. CARY ALDERSON,

R. L. SHREWSBURY,

W. R. LILLY,

By Counsel.

LILLY & SHREWSBURY, *Sols.*

Decree Dismissing Suit and King's Petitions, &c.

State of West Virginia:

At a special term of the Circuit Court of Marion County, held in and for said county, at the Court-house thereof, on the 11th day of January, 1908, the following order was entered:

In Chancery.

State of West Virginia

vs.

Henry C. King et als.

On motion of U. B. Buskirk, Trustee; U. B. Buskirk, J. Cary Alderson, R. L. Shrewsbury, and W. R. Lilly, to Dismiss Certain Lands Described in Their Petition.

This day this cause came on to be further heard upon the plaintiff's original and several amended bills and exhibits therewith, and the original and several other petitions and amended petitions of Henry C. King and exhibits therewith, and the several answers and amended answers of said Henry C. King and exhibits therewith heretofore filed and the replication thereto heretofore filed, upon the several petitions and answers of the other defendants heretofore filed and the answers and replications thereto heretofore filed; and upon the other orders and decrees heretofore entered in this cause.

Upon the petition and answers of Amos C. Hall and W. H. Stoddard; upon the answer of H. C. King thereto with general replication thereto; upon the petition and answer of M. B. Mullins, upon the answer of H. C. King thereto with general replication thereto; upon the original and amended motion in writing of M. B. Mullins to dismiss certain lands in his said petition mentioned and in said motions specified; upon the written motion of W. H. Stoddard, Albert C. Hall and Winnie Hall to dismiss certain lands in said motion specified, upon the amended and supplemental demurrer and answers of H. C. King to said several petitions and motion of said M. B. Mullins and Stoddard and Hall, which demurrer the court doth overrule, with general replication to said amended and supplemental answer; upon the petition of U. B. Buskirk, Trustee, upon the demurrer and answer of H. C. King thereto which demurrer the court doth overrule, and general replication to said answer; upon the amended petition of U. B. Buskirk, Trustee, U. B. U. B. Buskirk, J. Cary Alderson, R. L. Shrewsbury, and W. R. Lilly, filed on Monday, April 29th 1907, in pursuance of the order made and entered in this cause, in the 3rd day of March, 1907, in Chancery Order Book No 21, *age* 412, upon exhibits filed with said petition as follows:

"Exhibit Exclusions"; Exhibit, "Description No. 1, No. 2, No. 3, No. 4, No. 5, No. 6, No. 7, No. 8, No. 9, No. 10, No. 11, No 12, No 13, No 14, No 15, No. 16, No. 17, and No. 18," and upon Exhibit "Map U. B. B.", and exhibit marked "Report Exhibit No. 1", with the Deposition of George Sarver" and "Map Exhibit No. 2, filed with the deposition of George Sarver, and "Exhibit W. B. McClure, Commis-

sioner of School Lands of Wyoming County vs. the 480,000 acres formerly owned by Robert Morris and now claimed by Jesse R. Irwin," "Exhibit Hovt Cause". Exhibit "Pomeroy Deed", Exhibit "State of West Virginia vs. Jesse R. Irwin et als., Record", and Exhibit "King vs. Hinchman Record", and Exhibit "Auditor's Certificate", and Exhibit, "Proper Location of the 500,000 acres", upon process to answer said petition duly issued, against the defendants named in said petition, and duly executed upon or accepted by said defendants; upon the answer of Henry C. King to said last mentioned petition and the demurrer of said *Henry C. King* to said petition, which demurrer is hereby overruled, and to which answer the said petitioners reply generally; upon the depositions of V. D. Curry, John D. Vance, M. B. Mullins, G. S. Stone, C. S. Stone, George Sarver, E. B. McClure and J. L. Cook, filed herein Sept. 14th, 1905, upon the depositions of G. T. Christian, T. K. Tiller, M. C. Mitchell, Clement Mitchell, Erastus Perry and C. S. Stone, filed herein on the 30th day of November, 1906; upon the depositions of E. M. Senter and Maynard F. Stiles filed herein on the 30th day of November, 1906; upon the deposition of Alex. Stafford, R. L. Shrewsbury, Myran Christian, T. K. Tiller and J. M. Vance, filed herein on the 4th day of January, 1907, upon the depositions of T. K. Tiller, Clement Mitchell, Erastus Perry, John T. Vance, C. S. Stone, R. L. Stone, T. B. Stone, C. J. Pearson and W. H. Pile, filed herein on the 1st day of June, 1907; upon the depositions of W. D. Sell and Maynard F. Stiles filed herein on the 1st day of June, 1907; upon the depositions of Alfred Phillips and W. D. Sell filed in this cause on the 24th day of Jan. 1907, together with the maps, records, survey and other exhibits filed with said depositions as exhibits and parts thereof; the depositions taken before the filing of the last mentioned petition of U. B. Buskirk, Trustee et als., are read by agreement subject to objections therein noted, upon the other depositions and exhibits therewith heretofore taken and filed in this cause and not heretofore excluded by the previous orders of the court so far as *the* relate to the controversy in this proceedings now heard; upon the several reports of Commissioner John T. Graham with the sundry exceptions thereto filed in this cause including the exceptions in writing

of petitioner U. B. Buskirk, Trustee and others this day filed and marked "Exceptions XX;" relating to the lands now here in controversy and upon the other papers heretofore filed and proceedings heretofore had herein in relation to the land now here in controversy and the petitioners U. B. Buskirk, Trustee and others moved the court to dismiss from this suit the lands claimed by them and specified in their last amended petition filed in this cause.

And thereupon the defendant Henry C. King tendered his petition asking to be allowed to redeem a tract of land situate in Logan county, West Virginia, set out and described therein, to the filing of which said petition the defendant U. B. Buskirk, Trustee and others object, but the court overruled said objections and permitted said petition to be filed, which is done accordingly and said U. B. Buskirk, Trustee and others here adopt their said amended petition and Exhibits therewith and other papers filed by them as their answer to such petition of said Henry C. King.

And it being admitted in open court by said Henry C. King and said U. B. Buskirk, Trustee and others that the grant of land set out and described in said petition of said Henry C. King and now asked to be redeemed are the same lands designated as tracts Nos. 5, 6, 7, 8, 9, & 10 hereinafter mentioned and a part of the same lands claimed by said U. B. Buskirk, Trustee and others in their amended petition filed herein; and a part of the same land described and sought to be redeemed by said Henry C. King in his petition heretofore filed in this suit, and a part of the lands by this decree dismissed from this suit, the Court doth deny the right of said Henry C. King to redeem said land and doth dismiss his said petition as to the lands hereinafter dismissed from this suit and mentioned in his said petition.

On consideration whereof, it is adjudged ordered and decreed that the lands claimed by said petitioners, U. B. Buskirk, Trustee and others and described in their amended petition and exhibits filed therewith be and the same are hereby dismissed from this suit, which said lands so dismissed from this suit are situate in Logan and Mingo Counties, West Virginia, and are located and described by metes and bounds as follows:

Tract No. 4,—4,292 Acres.

Situate between *Ruffa-* and *Huff* Creeks in Logan County.

Beginning at two birches & a sycamore (all down) on left bank of Guyandotte River cor. to Gordon McD. 300 Acres, thence with same.

1. N. 6643 E. 394.3 feet to a small beech & birch on lower edge of a beech about 250 ft. below left fork of Pound Mill Br. cor. to C. R. McD. 300 acres S. L. tract, thence with the latter.

2. N. 7400 W. 610 ft. to a chestnut oak & Chestnut Oak on a cliff of a point, thence up said point.

3. N. 41° 55' W. 517.6 ft. to two white oaks on the—— ridge between Huff & Buffalo Crs. thence up said ridge.

4. N. 4500 E. 331.1 ft. to a water oak on said ridge; thence leaving same & along side of the mountain.

5. N. 5955 E. 2085 ft. to four horn beams on said divide in low gap; thence

6. S. 7550 E. 233 ft. to two small hickorys & a spanish oak on a knob thence

7. No. 5200 E. 2063 ft. to a chest. & C. O. (latter down) on a knob and head of Line Hollow; thence

8. N. 6400 E. 448.9 ft. to a chestnut & black pine on said divide; thence

9. S. 5215 E. 1335.2 ft. to two small pines on a knob at head of Little Bull Hollow; thence

10. N. 7700 E. 620 ft. to a chestnut on a knob, thence

11. N. 5000 E. 670 ft. to two small chestnuts (both down) on small knob; thence

12. S. 72° 30' E. 1580 ft. to a rock in head of Pond Mill Br. Thence Due South.

13. 11° 40' .9 ft. to a pine on the divide between said Pound Mill & Riddle Branches; thence

14. S. 50° 55' W. 610 ft. to a stake on said ridge; thence

15. S. 64° 45' W. 2237 ft. to five chestnuts on a knob, cor. to said Gordon McD. 300 Acre Pat. and a 206 acre S. L. tract owned by M. Cd. H. Thence with the latter

16. S. 06° 50' E. 1930 ft. to three C. O. on a knob,

17. S. 67° 08' E. 398 ft. to a C. O. water oak & two lynns;

18. S. 72° 05' E. 301 ft to a hickory, water oak & two lynns (last two down),

19. S. $69^{\circ} 53'$ E. 159 ft. to a water oak (down) on a point; thence down the mountain,

20. S. $37^{\circ} 00'$ E. 932.2 to two sycamores on left bank of Huff's Cr. (down) opposite mouth of Big Squirrel B. B. cor. to William War 310 acre patent and a 48 acre tract now owned by Mary Perry; thence with the latter

21. N. $18^{\circ} 15'$ E. 1499.4 ft. to a Sanish oak and Hickory (down) on a ridge Cor. to the Robert S. Claypool 299 Acre S. L. tract; Thence with the former

22. N. $14^{\circ} 15'$ W. 693.1 ft. to an ash and sugar tree near a coal bank on right side of left fork of Riddle Br. thence

23. N. $68^{\circ} 00'$ E. 285 ft. to a stake in line of said Perry 48 acre tract & cor. to said Claypool 299 acre tract; thence with the latter

24. N. $10^{\circ} 45'$ E. 2310 ft. to a large rock on the dividing ridge between Pound Mill and Riddle Branches; thence

25. S. $59^{\circ} 15'$ E. 2265 ft. to a stake in line of the Wm. Claypool 190 acre S. T. tract; thence with said tract.

26. N. $48^{\circ} 18'$ E 1300 ft. to a hickory and lynn on a point of the main dividing ridge between Huff's Cr. & Riddle's Br. thence

27. N. 8000 E. 4750 ft. to a large Ch. Oak near the head of left fork of Dry Br. Cor. to the F. D. Brown 76 acre School Land Tract; thence with two lines of same

28. S. 3545 E. 1680.5 ft. to a lynn (down) about 300 from left fork of Muddy Rock House in edge of field; thence

29. S. 1000 W. 1879.4 feet to a beech & white walnut (down) cor. to Wm. Ward 500 acre patent; thence with same,

30. S. 2900 W. 715 ft. to a cucumber on left bank of Huff's Cr. Cor. to Joseph McDonald's 250, acre patent thence with Huff's cor.

31. S. 6235 E. 372.5 ft. to a beech & white oak (down) on bank of said Cr. Cor. to L. D. Hinchman 95 acre School Land tract and with same

32. N. 6400 E. 5180 ft. to a white oak (down) just under a knob by a large cliff; thence

33. S. 3612 E. 2370 ft. to a stake on lower side of a hollow back of Ed. Cook's; thence 34.8 3515 W. 1155 to a beech on left bank of Huff's Cr.; thence up the Cr.

35. N. 8545 E. 435 ft. to a beech, ash & pawpaw (down)

on bank of where creek used to run, Cor. to Hector 200 acre patent (now owned by C. W. Cook) & a 230 acre patent owned by J. M. Vance; thence with the latter,

36. N. 3445 W. 4635 ft. to a black gum (down) near edge of field, thence

37. N. 2900 E. 825 ft. to an Elm & Mulberry (latter down) on edge branch back of Ed. Cook's; thence up the mountain,

38. N. 6735 E. 865 ft. to a black oak on a point (down).

39. N. 5700 E. 992 ft. to a chestnut and beech (down) on lower side of a point; thence

40. N. 6400 E. 7393 ft. to a crooked chestnut oak by a large cliff thence

41. N. 7210 E. 871.1 ft. to a rock on a point; thence

42. N. 5400 E. 482.1 ft. to a rock on a point; thence

43. N. 1835 E. 985 ft. to two rocks near the head of Fall Rock Hollow; thence down same,

44. S. 4320 E. 1880 ft. to three black oaks (down) on a point; thence

45. N. 8800 E. 1053 E. 1053.5 ft. to a mulberry on right bank of Muddy Ridge BB. Thence

46. S. 4100 E. 1730 ft. to a black oak & hickory (down) on steep ground above a cliff; thence down the mountain due South

47. 4613 ft. to slope on left bank of Huff's Cr. thence up same

48. N. 7430 E. 651 ft. to a beech, sycamore & ironwood, (down) at mouth of Lick Branch Cor. to Jas. Brown 69 Acre patent & with crossing Cr. Due North 452 ft. to a sugar tree (down) by a cliff; thence

49. N. 4308 E. 1412 ft. to a large beech on bank of Sugar Camp Br. thence S. 6300 E. 726.4 ft. to a beech, hickory & white oak (down) in a swag; thence

50. N. 81 E. 2310 ft. to an ash on a hill side above Ham Cook's House; thence

51. N. 3830 E. 313.1 ft. to a stake, sycamore to be in the division line between Logan & Wyoming Cos. thence

52. N. 3515 W. 4700 ft. to a sugar tree two chestnuts & a hickory on a knob about 1200 feet from Grassy Springs Cor. to Wm. McClure 700 acre tract; thence with same,

53. N. 8945 E. 461 ft. to a large chestnut on a knob at head of Muddy Ridge Branch; thence

54. N. 4730 E. 2337 ft. to a chestnut oak on said ridge; thence

55. S. 6610 E. 611 ft. to a stake in line of Jos. Brown 45 acre patent; thence with same,

56. N. 3100 E. 2264 ft. to two chest. *oak*- on Bear Wal-low Ridge (down); thence

57. N. 6500 E. 1061.1 ft. to a chestnut oak on a point (down) thence

58. N. 8100 E. 165 ft. to a Ch. Oak on side of a ridge (down); thence

59. S. 0200 E. 341.1 ft. to a stake on dividing ridge between Buffalo & Huff's Cr. thence,

60. N. 6030 E. 774.8 ft. to a *po-lar* two sugar trees & 2 cucumbers (down) on said divide at head of left fork of Beech Cr. thence with said County line.

61. N. 8700 E. 249 ft.

62. N. 3230 E. 137 ft.

63. N. 2215 E. 278 ft.

64. N 6930 E 351 ft.

65. S. 4445 E. 251 ft.

66. S. 4045 E. 220 ft.

67. S. 2720 E. 119 ft. to a stake in Rutter & Etting line thence with said line down the mountain,

68. N. 0030 W. 3860.0 ft. to a stake in line of said Rutter and Etting where the Anthony Lawson 200 Acre patent crosses same, thence with said 200 Acre tract.

69. S. 86 00 W. 335 ft. to a large beech on said fork and corner to the Anthony Lawson 200 Acre Survey.

70. S. 73 20 W. 1211 ft. to a beech and maple on the bank of said fork thence up Jordan's Fork.

71. S. 25 25 E. 1875 ft. to a beech and brush on the bank of said Jordan's Fork.

72. N. 84 30 W. 492 ft. to a large poplar stump on the branch, thence down said fork

73. N. 21 00 W. 720 ft. to a stake on said fork.

74. N. 77 00 W. 3287 ft. to a maple and beech in the right fork of said Buffalo, corner to the Anthony Lawson 66 acre Survey, thence with same,

75. S. 7° 00 W. 198 ft. to a stake on a hill side on the South side of the right fork,

76. N. 75 50 W. 780 ft. to a sugar tree and walnut,

77. S. 79 20 W. 1942 ft. to a water birch on the bank of said fork,

78. S. 39 45 W. 1309 ft. to a sugar tree;

79. S. 10 06 W. 1221 ft. to a stake at the foot of the hill.

80. S. 11 00 W. 850 ft. to a stake on a hill side where once stood two beeches.

80. S. 58 00 W. 2442 ft. to a stake on a hill side,

81. S. 76 00 W. 910 ft. to a stake on a hill side, 60 ft. from the Creek,

82. S. 56 00 W. 726 ft. to a stake on a hill side.

83. S. 43 15 W. 1555 ft. to a poplar and beech at the foot of the hill on the upper side of Jack's branch thence crossing the said right fork.

84. N. 13 35 W. 299 ft. to a stake with beech, sycamore and birch pointers on the bank of said fork, thence leaving the Anthony Lawson 66 Acre Survey down said right fork,

85. N. 82 32 W. 949 ft. to a stake on a hill side corner to the J. B. Mitchell 66 acre survey, thence with the same down said fork

86. S. 43 30 W. 921 ft. to a *po-lar* stump at the foot of the hill and beech pointers,

87. S. 79 30 W. 3551 ft. to a stake on a hill side.

88. N. 71 30 W. 2233 ft to a stake near the foot of a hill,

89. N. 58 30 W. 1221 ft. to a stake on a hill side in a laurel patch,

90. N. 30 30 W. 947 ft. to a stake on South side of said fork, corner to the Nathaniel Mullins 30 Acres Survey, thence with the same down said fork.

91. N. 28 45 W. 1188 ft. to a stake on a small island,

92. N. 63 00 W. 470 ft. to a stake on a bank of said Creek,

93. N. 41 00 W. 590 ft., to a stake, 20 feet from the foot of a hill.

94. N. 71 00 W. 693 ft. to a stake on a hill side.

95. N. 59 00 W. 528 ft. to a stake on a hill side.

96. N. 32.40. W. 495 ft. to a stake at foot of a hill near coal opening.

97. N. 51 00 W. 960 ft. to a stake on a hill side, thence crossing the corner.

98. N. 27 00 E. 330 ft. to a stake in the creek where once stood a poplar and sycamore, thence leaving the said 40 Acre patent.

99. S. 82 45 W. 372 ft. to a hub in the bottom 1650 ft. from the base line at the mouth of the right fork, Thence down Buffalo parallel with said base line & 100 poles therefrom

100. S. 43 25 W. 1661.9 ft.

101. S. 1132 W. 2410 ft.

102. S. 6253 W. 3850 ft.

103. N. 8354 W. 1822 ft.

104. S. 4731 W. 1047.7 ft

105. S. 5700 W. 1035 ft.

106. S. 5257 W. 250.1 ft.

107. S. 2026 W. 1080 ft.

108. S. 4002 W. 1875 ft.

109. S. 4844 W. 2460 ft. to the beginning Containing 4292 Acres.

Memo:

There is omitted tract

No. 1 containing 2,698.85 acres

" 2 " 4,149.73 "

" 3 " 137.4 "

" 5 " 1,552.0 "

" 6 " 2,780.8 "

" 7 " 203.9 "

No. 8 Containing 2.0 acres

" 9 " 108.0 "

" 10 " 3.0 "

" 13 " 1,025.72 "

" 15 " 62.0 "

" 16 " 596.87 "

" 17 " 587.50 "

" 18 " 385.60 "

from this copy.

And as to the said lands so dismissed from this suit, it is further adjudged, ordered and decreed that said original and several amended bills of the plaintiff and the several petitions and amended petitions of H. C. King be and the same are hereby dismissed, and that the right of the plaintiff to sell any of the lands so dismissed from this suit be and the same is hereby refused and denied, and the right of H. C. King to redeem any of the said lands so dismissed from this suit is likewise hereby denied and refused.

It is further adjudged, ordered and decreed that the several exceptions of the petitioners U. B. Buskirk, Trustee, and others, and of their predecessors in title to so much of said reports of John T. Graham, Commissioner, as relates to or in any wise *affect* the lands so dismissed from this suit, are hereby sustained, and in so far and to the extent as the said reports, and each of them, are in conflict or in any wise inconsistent with this decree, and that said reports to that extent be and the same are hereby set aside.

This decree is without prejudice to the right or claims of the Kimberling Land Company to certain portions of the lands so dismissed from this suit as specified in its petition, filed herein, as against U. B. Buskirk, Trustee, and *other* holding with him.

To the introduction or consideration in evidence of each and every of which said bills, answers, petitions, decrees and other proceedings from said cause of State of West Virginia vs. Henry C. King and others, the defendants by counsel, objected, upon the ground that the same were, and that each of them was irrelevant, immaterial and incompetent, because the defendants in this cause were not parties to said cause and did not derive or claim any title from the said Henry C. King or the said U. B. Buskirk, trustee, or his associates nor from the State since the institution of said suit, and were not named as parties to said petition of Buskirk, trustee, and others, and said decree and proceedings did not attempt to confer any title upon said Buskirk or his associates, under who the plaintiff in this cause claims title; and if the said decrees or proceedings be treated as adjudicating any question relating to the title or rights of these defendants, the said decrees and proceedings and the State, in whose name the same were had, to that extent deprive the defendants of property without due process of law, in contravention of the provisions of Section 1 of Article 14 of the Amendments of the Constitution of the United States; and the giving of effect to said proceedings or decrees against said defendants in this cause by the court would deprive them of property without due process of law in contravention of Article 5 of the Amendments of the Constitution of the United States;

which objection of the defendants the court overruled and permitted said bills, petitions, answers, decrees and proceedings to be read in evidence to the jury, and to which action of the court the defendants, by counsel, then and there excepted and prayed that said exception be saved to them and be made part of the record of this cause, which is accordingly done. And this is defendant's Fifth Exception.

EXCEPTION NO. 6.

Be it further remembered that upon the trial of this cause and after the introduction in evidence of the papers set forth and indicated by the preceding exceptions, the plaintiff, further to maintain the issues on its part, offered in evidence a copy of the bill of complaint in the chancery cause instituted in the circuit court of West Virginia for the county of Logan, entitled State of West Virginia vs. Alexander McClintock (Exhibit No. 13 of said stipulation); a copy of the decree of reference in said cause, entered on the 9th day of September, 1893, (Exhibit No. 14 of said stipulation); a copy of an order entered on the 19th day of June, 1894 filing a report of commissioner, pursuant to preceding order (Exhibit No. 15 of said stipulation); a copy of the answer of Alexander McClintock, and of an order filing the same in said cause (Exhibit No. 16 of said stipulation); a copy of an order of partial confirmation of commissioner's report in said cause (Exhibit No. 17 of said stipulation); a copy of the amended bill of State of West Virginia in the said cause (Exhibit No. 18 of said stipulation); a copy of answer of Henry C. King to amended bill in said cause (Exhibit No. 19 of said stipulation); a copy of a decree of reference entered July 30, 1907, in said cause (Exhibit No. 20 of said stipulation); a copy of petition and answer of Buffalo Coal and Coke Company and Altizer Coal-Land Company, filed in said cause (Exhibit No. 21 of said stipulation); a copy of report of chancery commissioner, Robert Bland, filed in said cause (Exhibit No. 22 of said stipulation); a copy of decree entered May 14 1910, in said cause (Exhibit No. 23, of said stipulation); which said several bills, answers, peti-

tions, reports, decrees and proceedings are in the words and figures following to-wit:

EXHIBIT NO. 13.

The State of West Virginia

vs.

Alexander McClintock, et als.

Bill of Complaint.

(Filed July 1893 Rules)

State of West Virginia,

Logan County, to-wit:

To the Hon. Thos. H. Harvey, Judge of the Circuit Court of said County:

The Bill of Complaint of the State of West Virginia, Plaintiff, against The Unknown Heirs of DeWitt Clinton, The Unknown Heirs of John Green, L. W. Knox and R. W. De Foster, Trustees and Executors of Burr Wakeman, Deceased; The Unknown *Hiers* and Legatees of Burr Wakeman, Deceased; The Unknown Heirs of Samuel Benedict, Deceased; The Unknown Heirs of J. S. Cunningham, Helen M. Cunningham, B. C. Bowman, the Bowman Lumber Company, a corporation; Alexander McClintock, Alexander McClintock and John McClintock, Partners doing business under the firm name of Alexander McClintock and Son; W. D. Fontaine and C. B. Fontaine and Brother; M. B. Mullins, U. B. Buskirk, John B. Floyd, G. O. Chilton, James Malcum, T. C. Hall, J. A. Sheppard, Jesse R. Irwin, Alvin Irwin, Harris Hoyt, Marie E. Hoyt, C. F. Thomas, James A. Brown, in his own right, and James A. Brown, Trustee for himself and Charles L. Talbott; John McClintock and Alexander McClintock, Nathaniel R. Benson, John T. Wills, Wm. C. Jones and John McClintock, in his own right, Defendants.

The plaintiff complains and says that on the first day of May, 1893, U. B. Buskirk, the commissioner of school lands for said Logan county, filed in said Court his annual report of lands, which, in his opinion, are liable to sale for the benefit of the school fund of the State in the manner re-

quired by him by chapter 24 of the Acts of 1893 of West Virginia; that among others the following tracts and parcels of land situate in said county, were reported by said commissioner of school lands and included in his said report as forfeited lands which had been reported to him by the surveyor of said Logan County, as is required by him (the surveyor) by said chapter 24, viz:—

No. 1b 348 Buffalo Creek of Guyandotte River.

2b 346 Same

3b 316 Same

4b 220 Same

5b 315 Same

6b 300 Same

7b 380 Moores and Jordan's F'k, Buffalo.

8b 225 North side, right f'k, Buffalo.

9b 268

10b 179 Right f'k of same.

11b 462 Right f'k of Buffalo.

12b 448 Same, south side.

13b 377 Jack's North br. of same.

14b 275 Jack's North br. of same.

15b 200 Meridith hollow of same.

16b 275 Right f'k of Buffalo.

17b 218 Same.

18b 70 North side, right f'k, same.

19b 245 Riff's branch.

20b 321 Riff's branch and Marcum hollow.

21b 187 North side, right f'k.

22b 310 Right f'k of Buffalo.

Duly certified copies of the plats and surveys of each of said tracts made by the surveyor of said county are filed herewith, marked by the numbers as above given, and prayed to be taken, read and considered as parts of this bill.

The plaintiff alleges that each and all of the foregoing tracts of land are situate inside and are parts of a tract of 142,000 acres of land granted by the Commonwealth of Virginia to DeWitt Clinton on the 19th day of February, 1796, a large portion of which is overlapped by a tract of 84,000 acres of land granted by the Commonwealth of Virginia to John Green on the day of, 1796; copies of each of the said grants, together with a map

showing so much of the said 142,000 acres as is located in said county, as well as the lap thereon by the said tract of 84,000 acres, will be filed herewith in due time, marked "A", "B" and "C", respectively, and are asked to be taken and considered as parts of this bill.

The plaintiff further alleges that the title to so much of the said 142,000 acre tract as lies in said Logan county, as well as that of the 84,000 acre tract overlapping the same granted as above set forth, were each forfeited to and vested absolutely in the Commonwealth of Virginia long prior to the formation of the State of West Virginia for non-entry upon the assessor's land books, and that the same was transferred to and vested absolutely in the State of West Virginia at the date of her formation on the 20th day of June, 1863; that the portion of the same located in said county of Logan has not been redeemed nor released from said forfeiture, but that portions thereof have been otherwise disposed of by junior grants from the Commonwealth of Virginia, and also by the plaintiff since her formation, in the manner provided by statute of the sale of school lands, the title to which parts so disposed of are not forfeited and are not sought to be sold in this suit; that each and all of the tracts hereinbefore *fully* set forth are now the absolute property of the plaintiff and liable to sale for the benefit of the school fund of the State; that the above *acts* are all of the parts of said survey of 142,000 acres that have been so far ascertained and reported by the said surveyor and commission of school lands, but the plaintiff is informed, believes and charges that there are other large and valuable portions of said tract of 142000 acres liable to sale for the benefit of the school fund which have not yet been surveyed and reported by the said surveyor and commissioner of school lands and cannot, therefore, be described in this bill.

The plaintiff is not at this time informed who had the legal title to said tract of 142,000 acres at the date of forfeiture thereof, but charges that the following persons claim title thereto or interest therein as follows: Benjamin C. Bowman derived claim of title to all that portion of the said 142 000 acres which laps over and included all the tracts herein mentioned as reported by the said surveyor and herein sought to be sold, by deed from Robert W. De

Forest and L. W. Knox, executors and trustees of the estate of Burr Wakeman, deceased, bearing date February 28th, 1891, the said Burr Wakeman being a remote grantee of the said DeWitt Clinton, and the defendant, B. C. Bowman and wife and the Bowman Lumber Company, a corporation, on the 1st day of September, 1891, undertook to convey by deed of that date all the poplar, walnut, ash, cucumber and lynn timber upon the said land, together with all suitable and convenient rights of way thereof to the defendant, Alexander McClintock; that the defendants, Jesse R. Irwin, Alvin Irwin, Harris Hoyt, Marie E. Hoyt, and C. F. Thomas, claim title to the lands hereinbefore fully set forth under and by virtue of purchase from the commissioner of school lands of Wyoming county in the year 1885 by the defendant, Jesse R. Irwin, as the former owner under the statute then existing of a 480,000 acre survey patented to Robert Morris. The defendant, John McClintock, claims title to all the standing timber on the main right-hand fork of Buffalo Creek, which includes the lands sought to be sold in this suit, by virtue of a purchase from the defendant, James A. Brown, trustee for himself and Charles L. Tabbott, Alexander McClintock and John McClintock, by deed dated July 15th, 1892; the said James A. Brown, trustee as aforesaid, having received the same by deed of trust from the defendants, Jesse R. Irwin, Alvin Irwin, Harris Hoyt, Marie E. Hoyt, and C. F. Thomas, dated November 10th, 1890. The defendant, Wm. C. Jones, claims *and* interest in said tract by virtue of two deeds from the defendant, Alvin Irwin, but the plaintiff is not informed as to the extent of his claims.

The defendant, John T. Wills, appears to have a deed from the defendant, Jesse R. Irwin, for the whole of the 480,00 acres survey dated January 10th, 1881. The defendant, Nathaniel R. Benson, appears to hold a mortgage upon the said 480,000 acre survey executed by Jesse R. Irwin to him to secure the payment of \$25,000.00-100 on the 25th of March, 1886. It also appears that John S. Cunningham in his lifetime and Helen M. Cunningham claimed an interest in the said 142,000 acre survey, the extent of which claim is unknown to the plaintiff, and as the plaintiff is informed the said John S. and Helen M. Cunningham sold, or contracted to sell, their interest in said

land to the defendants G. O. Chilton, James Malcum, T. C. Hall, M. B. Mullins, John B. Floyd, U. B. Buskirk, and Jno. A. Sheppard, all of whom as the plaintiff is informed, believes and charges have sold their claim and interest to the defendant, Alexander McClintock, but none of the last mentioned contracts are of record, and the plaintiff is therefore unable to do definitely set out their terms and extent of the claim covered by them; but the plaintiff here alleges that no part of the land 480,000 acres of land laps over or in anywise interferes with the said 142,000 acres, but even if it does, which this plaintiff is no wise admits, all that portion of it which is claimed to lie in Logan County and which is claimed to over-lap the said 142,000 acres if forfeited to the Stae for non-payment of the taxes thereon for the year 1886; that the same forfeited to the State of Non-payment of the taxes therein for that year in the names of Defendants, Jesse R. Irwin, C. F. Thomas, Harris Hoyt, and Alvin Irwin, and was sold by the sheriff of said last mentioned county on the 13th day of February, 1888, purchased by said sheriff for the State and not redeemed within one year thereafter as required by law, and has not since been redeemed, exonerated or released from the said forfeiture.

The plaintiff further alleges, and so charges, that the aforesaid claims of titles are all the titles claimed to the lands herein asked to be sold, either by the records or otherwise, and that they are all forfeited to the State for non-entry upon the assessor's land books and non-payment of the taxes as aforesaid and are the absolute property of the plaintiff.

And the plaintiff further complains and says that the defendants, Alexander McClintock and John McClintock, partners doing business as Alexander McClintock & Son, and W. D. Fontaine and C. B. Fontaine, partners doing business as W. D. Fontaine & Bro., have entered into some kind of a contract which is not recorded, and the terms of which are unknown to the plaintiff, under and by virtue of which, as the plaintiff is informed, believes and charges, the said W. D. Fontaine and Brother are now cutting, hauling, removing and disposing of large quantities of the valuable poplar, ash, walnut, cucumber and lynn timber from the lands herein sought to be sold; that they have already cut over 1,000 trees, worth at least \$3,000, and now have con-

stantly employed in cutting the same about sixty men, whose names are unknown to the plaintiff; and the plaintiff here alleges, and so charges, that the said land is wild and uncultivated, very rough and mountainous, and whether it contains any mineral this plaintiff is not informed, but even if it does there is no means of transportation and the same cannot be utilized, and the said timber constitute the chief value of the said land, and that if the said Fontaine & Brother are permitted to go on and cut and remove the said timber that it will so reduce the value of said land that it will be almost worthless upon the market; that the cutting and removing of said timber will work a permanent and irreparable injury to the lands of the plaintiff hereinbefore fully set forth.

The plaintiff further alleges that the defendant, W. D. and C. B. Fontaine, both as individuals and as the firm of W. D. Fontaine & Brother, are insolvent and that a judgment at law against them, or either of them would be worthless; and the plaintiff being advised that all such acts are contract of equity and good conscience and that it has no adequate remedy save in your Honor's court of equity, where matters of this kind are alone properly cognizable, therefore prays that an injunction be awarded against the said Alexander McClintock, John McClintock, C. B. Fontaine and W. D. Fontaine, enjoining, inhibiting and restraining them, and each of *the*, their agents, employees and all others from cutting and removing any timber from the lands of the plaintiff by it asked to be sold herein, and from removing any of the timber all ready cut from the said land to be at once taken into custody by the commissioner of school lands of this county and advertised and sold to the highest bidder, and that upon a final hearing hereof that said injunction be *perpetuated*, and that all proper accounts be taken herein *fro* the purpose, among other things, of ascertaining what other parties, if any, of the said 142,000 acre survey are likewise forfeited and liable to be sold for the benefit of the school fund, and after a final adjudication of the matters herein involved that a decree of sale be rendered herein directing a sale of all the lands herein mentioned as reported by the said surveyor and all other parts of the said 142,000 acre survey that may be found to be liable to sale for the benefit of the school fund,

and for all such other, future and general relief as is suited to its case.

STATE OF WEST VIRGINIA,
By Counsel.

SHEPPARD, *Sol.*

EXHIBIT NO. 14.

First Decree of Reference.

And on the 9th day of September, 1893, the following decree was made and entered:

The State of West Virginia
vs.) In Chancery.
Alexander McClintock.

The summons in this cause having been executed upon the defendants Alexander McClintock, John McClintock, C. B. Fontaine, W. D. Fontaine, James Brown, G. O. Chilton, Alvin Irwin, T. C. Hall, James Malcolm, John B. Floyd, M. B. Mullins, U. B. Buskirk, Jno. A. Sheppard and Jesse I. Irwin by personal service and upon all of the other defendants by order of publication duly published and posted as required by law the plaintiffs bill and exhibits filed and this cause having been regularly matured at rules set out for hearing and all of the defendants served with process except Alexander McClintock still failing to appear plead answer or *demurr* the confession entered against them at rules is confirmed. And now this cause coming on to be heard upon all of the papers filed and orders and decrees made and entered herein and upon the plaintiffs bill and exhibits and was argued by counsel for the plaintiff. And after mature consideration the court is of opinion to and doth hereby refer this cause to J. Cary Alderson one of the Commissioners in Chancery of this Court with instruction to take, state and report on account showing

1st. What parts and parcels of the tract of 142,000 acres mentioned and set out in the bill or that may be ascertained by proof or otherwise are liable to sale for the benefit of the School fund. When, for what cause and in whose name forfeited. The taxes and interest on each of said parties.

2nd. Any other matter deemed *pertenent* by said Commissioner or required by any party in interest.

And for the purposes of executing the requirements of this decree said Commissioner is authorized to employ the county surveyor or any one of his deputies to do such surveying as he may think necessary.

But before proceeding to execute the requirements of this decree said commissioner shall give the notice required by law.

EXHIBIT NO. 15.

Order Filing Report of Commissioner Alderson.

And on the 19th day of June, 1894, the following order was entered:

State of West Virginia
vs.) In Chancery.
Alex. McClintock et al.

This day Commissioner Alderson tendered and asked leave to file his partial report herein, which leave is granted and the same is accordingly filed. It appearing to the Court that this order should have been entered at the last term of this Court the same is directed to be entered now as for then.

REPORT.

State of West Virginia
vs.) In Chancery.
Alex. McClintock et al.

To the Hon. Thos. H. Harvey, Judge of the Circuit Court of Logan County, West Virginia:

Your commissioner to whom the above entitled cause was referred by a decree of your Honor's court, made and entered at the August, term, 1893, thereof, would respectfully report that in obedience to the requirements of said decree of reference he gave the notice required by law, as will fully appear from a certificate of the publication and posting of said Notice, filed herewith as part of this report, Com'r Exhibit "A".

Your Com'r. then proceeded to ascertain and report under the requirements of said decree of reference as follows:

Requirements.

What parts and parcels of the tract of 142,000 acres mentioned and set out in the bill or that may be ascertained by proof or otherwise are liable for sale for the benefit of the School Fund when, for what cause and in whose name forfeited and the taxes and interest on each of such parts.

The plaintiff alleges in its bill that the said tract of 142,000 acres of land, as well as the John Green 84,000 acres survey which overlaps the same, was forfeited to the State of Virginia and the title thereto transferred to and vested in this plaintiff on the formation of this State. There is no evidence before your comr. touching the allegation, but your comr. finds that all that part of both of said surveys lying in Logan County was forfeited to and the title vested in this plaintiff for non-entry upon the Land Books of this County for five successive years after the year 1869. Your comr. further finds that a large portion of the said survey of 142,000 acres in Logan County and embracing the various tracts of land hereinafter reported, is claimed to be within the bounds of the Robert Morris 480,000 acre survey, and your comr. without passing upon the validity of such claim, finds that all that portion of the said survey lying in Logan County was returned delinquent by the Sheriff of said County for the non-payment of the taxes due thereon for the year 1886, purchased by said Sheriff for the state for the taxes of said year on the 13th day of February, 1888, and not redeemed within one year from the date of such purchase, and that the title thereto is now vested in this plaintiff. Your comr. has not been able to ascertain all the parts of said survey of 142,000 acres in this county which are liable to sale for the benefit of the school fund, but your comr. finds from the allegations in plaintiff's bill and exhibits filed therewith and from the reports of the surveyor of Logan County and his Deputies filed herewith as part of this report that the following parts or tracts of said survey are forfeited to the State and the title thereto is now vested in the State and

the same are liable to sale as prayed for in the plaintiff's bill. Plats, descriptions and report, marked and numbered by figures and letters corresponding to the numbers by which they are herein designated.

Your Comr. also reports the amount of taxes and interest due on each of said tracts from the formation of the state to the year 1893 inclusive, showing in separate columns the amount due the State, Logan County and Triadelphia District for Tuition Fund, Building fund and Road Levy.

No.	Acres	State	District		Bldg.	Road	Total.
		Tax	County	Tax			
2b	346	\$40.86	\$107.09	\$ 40.55	\$29.41	\$ 7.75	\$225.66
1b	384	41.10	107.71	40.79	29.58	7.80	226.98
3b	316	37.32	97.80	37.04	26.86	7.08	206.10
4b	220	25.98	68.09	25.78	18.70	4.93	143.48
5b	315	37.20	97.49	36.92	26.78	7.06	205.05
6b	300	35.43	92.85	35.16	25.50	6.72	195.66
7b	380	44.88	117.61	44.54	32.30	8.51	247.84
8b	225	26.57	69.64	26.37	19.13	5.04	146.75
9b	268	31.65	82.95	31.41	22.72	6.00	174.79
10b	179	22.19	55.40	20.98	15.22	4.01	177.80
11b	462	54.56	142.99	54.15	39.27	10.35	301.32
12b	448	52.91	138.65	52.51	38.08	10.04	292.20
13b	337	44.52	116.68	44.19	32.04	8.45	245.88
14b	275	32.53	85.11	32.23	23.38	6.16	179.41
15b	200	23.62	62.90	23.44	17.00	4.48	130.44
16b	275	32.53	85.11	32.23	23.38	6.16	174.41
17b	218	25.75	67.47	25.55	18.53	4.88	142.18
18b	70	8.27	21.67	8.20	5.95	1.57	45.66
19b	245	28.93	75.83	28.71	20.83	5.49	159.79
20b	321	37.91	99.35	37.62	27.29	7.19	209.36
21b	187	22.08	57.88	21.92	15.90	4.19	121.97
22b	310	36.61	95.95	36.33	26.35	6.94	202.18
23b	283	33.42	87.59	32.01	39.40	7.81	190.23
24b	78	9.21	24.14	8.82	8.10	2.15	52.42
25b	175	21.72	54.16	20.51	14.88	3.82	115.19
26b	310	36.61	95.95	36.33	26.35	6.94	202.18
27b	440	51.96	136.18	51.57	37.40	9.86	286.97
28b	480	56.59	148.56	54.29	49.87	13.25	322.66
29b	221	26.10	64.40	25.90	18.79	4.95	144.14

No.	Acres	State		District		Bldg.	Road	Total.
		Tax	County	Tax				
30b	156	18.42	48.28	17.64		16.21	4.31	104.86
31b	186	21.97	57.57	21.80		15.81	4.17	121.32
32b	951	112.31	204.33	107.56		98.81	26.25	639.26

Tracts Nos. 23b, 24b, 28b, 30b and 32b, are in Logan District. All of which is respectfully submitted this 19th day of December, 1893.

J. CARY ALDERSON, *Comr.*

Com'r. Fee—\$4.00 per tract—\$128.00.

EXHIBIT NO. 16.

Order Filing Answer of Alexander McClintock.

And on the 19th day of June, 1894, the following order was entered:

State

vs.) In Chancery.

Alex. McClintock et al.

This day came the defendant Alex McClintock and tendered his petition herein—which being seen by the Court is ordered to be filed.

Answer of Alexander McClintock.

State of West Virginia

vs.) In Chancery.

Alex. McClintock et al.

Pending in the Circuit Court of Logan County, W. Va.

To the Hon. Thos. H. Harvey, Judge of said Court:

The petition of Alexander McClintock would respectfully represent:

That the above styled cause is a suit brought by the state to sell certain lands in its bill mentioned for the benefit of the School Fund and that among other tracts therein proceeded against, is one of 142,000 acres lying partly in Logan County and Logan and Triadelphia districts on the waters of Buffalo and Spruce Creeks—which is known as the Burr Wakeman (and) or DeWitt Clinton Survey.

That the state has proceeded against said lands as being forfeited for non-entry upon the land books of Logan County, and that all persons in interest were duly made parties to said proceeding among whom is this petitioner. The petitioner would further charge that he is the owner in fee simple to said tract of 142,000 acres by title regularly derived from the said DeWitt Clinton the original patentee thereof—all of which will more fully appear by abstract here filed marked X as part of this petition in which reference *in* made to the various conveyances made transmitting the title thereof from said DeWitt Clinton to this petitioner—and to the records thereof.

Your petitioner further says that he has title paramount to said lands and title superior to that of all other persons whatsoever.

Your petitioner would further say that he is entitled to redeem said lands and the whole thereof from forfeiture and have the same placed upon the land books of Logan County for taxation.

Your petitioner would further say that in the event said lands are sold in this proceeding for the benefit of the school fund and they should sell for more than enough to pay up the taxes, interest and cost that this petitioner is entitled to the surplus arising from said sale after paying said taxes, interest and costs.

This petitioner would therefore pray—

That he be permitted to pay up the taxes, interest and cost chargeable against the land and redeem the same from forfeiture so far as the title is in the state in the lands.

That if said lands be sold and a surplus arise therefrom that said surplus may be paid over to this petitioner—the former owner thereof—

For such other further general relief as in equity he is entitled and he will ever pray.

ALEX. MCCLINTOCK.

By Z. T. VINSON, *Sol.*

EXHIBIT NO. 17.

Partial Conformation of Commissioner's Reports, &c.

At another day, viz: On the 20th day of June, 1894, the following decree was made and entered:

State of West Virginia
vs.) In Chancery.
Alexander McClintock et al.

This cause came on again this day to be further *hears* upon all the papers, orders and decrees heretofore read and entered herein, together with the report of Commissioner J. Cary Alderson, heretofore filed herein to which report there are no exceptions, and was *argues* by counsel. Upon consideration whereof it is adjudged, ordered and decreed that so much of said report as relates to tracts Nos. "32B", "24B", "23B", "30B", and "27B" be and the same is hereby confirmed, and it appearing to the Court from said report that the said tracts hereby confirmed are forfeited and liable to sale for the benefit of the school fund, and that the taxes and interest thereon due are as follows, Viz:

On tract No. 32 B. for State \$112.31, Co. \$294.33, Tuition \$107.56, Building \$98.81 and Road \$26.25, which tract contains 951 acres.

On tract No. 24 "B" for State \$9.21, Co. \$24.14, Tuition \$8.82, Building \$8.10 and for Road \$2.15, which tract contains 78 acres.

On tract No. 23 "B" for State \$33.42, for Co. \$87.59, Tuition \$32.01, for Building \$29.40, and for Road \$7.81, which tract contains 283 acres.

On tract No. 30 "B" for State \$18.42, for Co. \$48.28, for Tuition \$19.64, for Building \$16.21 and for Road \$4.31, which tract contains 156 acres.

On tract No. 27 "B" for State \$51.96, for Co. \$136.18, for Tuition \$51.57 for Building \$37.40, and for Road \$9.86, which tract contains 440 acres.

It is therefore ordered that U. B. Buskirk, Commissioner of School Lands for this County do sell the said several tracts of land above designated and numbered at public auction to the highest bidder at the front door of the Court House of this County, exacting one fourth of the purchase money cash in hand on day of sale and the residue to be paid in 6 and 12 months from day of sale in two equal payments, taking from the purchase bonds with good personal security, bearing interest from day of sale, but before proceeding to sell he shall advertise the time, terms and place of sale at least 4 successive weeks in the Logan Banner a newspaper published at Logan Court House, and report his

proceedings hereunder to court, and this cause is continued as to all the other tracts and parcels mentioned in said report.

EXHIBIT NO. 18.

Amended Bill.

(Filed October 18, 1906)

West Virginia.

In the Circuit Court of Marion County.

October, 1906.

State of West Virginia

vs.) In Chancery.

De Witt Clinton and others.

The amended bill of complaint exhibited by the State of West Virginia in the Circuit Court aforesaid against Robert Claypool, Roscoe Claypool, L. E. Browning, L. A. Browning, Harley Toler, Buren Browning, Hiram Burgess, S. S. Altizer, J. L. Caldwell, Walter Ashby, Elson Crawford, G. A. Porter, Fred Gardner, Lee Joyce, E. T. England, J. B. Ellison, Milton Mullins, Mae Mullins and Mrs. T. J. Pritchard.

The plaintiff complains and says that on the 14th day of June, 1893, it instituted a suit in chancery in the Circuit Court of Logan County against DeWitt Clinton, the unknown heirs of John Greene, deceased, L. W. Knox and R. W. De Forest, Trustees and Executors of Burr Wakeman, deceased, the unknown heirs and Legatees of Burr Wakeman, deceased, the unknown heirs of Samuel Benedict deceased, the unknown heirs of J. S. Cunningham, Helen U. Cunningham, B. C. Bowman, The Bowman Lumber Company, a corporation, Alexander McClintock and John McClintock, W. D. Fontaine and C. B. Fontaine, M. B. Mullins, U. B. Buskirk, John B. Floyd, G. O. Chilton, James Malcolm, T. C. Hall, John A. Sheppard, Jesse R. Irwin, Alvin Irwin, Harris Hoyt, Marie E. Hoyt, C. F. Thomas, James A. Brown, in his own right and as trustee for himself and Charles L. Bolbot, Nathaniel R. Benson, John T. Wills, and William C. Jones, and after-

wards, to-wit; At July Rules held in the Clerk's office of said Court, 1893, filed her bill of complaint against the last named persons and averring that the Commissioner of School Lands for Logan County on the first day of May, 1893, had reported to said Court that certain tracts and parcels of land situate in said County, as forfeited lands and liable to sale for the benefit of the school fund of the State. There were twenty-two of said tracts of land, *sitate* on Buffalo Creek in Logan County, and on the tributaries of said Creek, Copies of plats and surveys of each of said tracts, as made by the Surveyor of the County, were exhibited or intended to be exhibited, with and as part of said bill. That each and all of said twenty-two tracts are situate inside and constitute parts of a tract of 142,000 acres of land, which had been granted by the Commonwealth of Virginia to De Witt Clinton by letters patent bearing date on or about the 19th day of February, 1796. That the title to so much of the said 142,000 acres as lies in said Logan County was forfeited to and vested absolutely in the Commonwealth of Virginia long prior to the formation of the State of West Virginia for non-entry upon the assessor's land books, and that the same was afterwards transferred to and vested absolutely in the State of West Virginia at the date of her formation, on the 20th of June, 1863; that the said portion of said large grant so situate in said Logan County had never been at any time redeemed nor in any manner released for said forfeiture, nor in any manner disposed of, either by the Commonwealth of Virginia or by the State of West Virginia. That each and all of the tracts in said bill mentioned were then the absolute property of the State and liable to sale for the benefit of the school fund. *There* there were, as plaintiff was informed and averred, other large and valuable portions of said tract of 142,000 acres liable to sale for the benefit of the school fund, which had not yet been surveyed and reported by the said surveyor and Commissioner of School Lands, and for that reason, could not be described in said *original* bill. The plaintiff by allegations in said bill, showed the interest of the various named defendants in said tract of 142,000 acres of land and made them parties defendant to said bill; that none of said defendants to said bill had any subsisting title to said land or to said parcels there-

of, but whatever title they or their predecessors in title had, was forfeited for non-entry and non-payment of taxes. And among other things, the plaintiff prayed *that* an inquiry be made as to what other portions of the said 142,000 acre survey are forfeited and liable to be sold for the benefit of the school fund; that a decree of sale be rendered directing a sale of all the lands in said bill mentioned, and as reported by said Surveyor, and all other parts of said 142,000 acre survey that may be found to be liable to sale for the *benefit* of the school fund and for all such other, further and *general* relief as is suited *to* its case. Reference is made to said bill now on file in this Court.

Afterwards one Henry C. King filed a petition in said cause and was made a defendant therein. Plaintiff is informed, believes and charges that process to answer to said bill was sued out and *served* upon the home defendants and that an order of publication was awarded at rules against the non-resident defendants and The same was duly published and posted as required by law.

After said cause was matured for hearing sundry orders and decrees were pronounced and entered by the Circuit Court of Logan County. And afterwards the *said* cause, for reasons appearing to the Court, was transferred to the Circuit Court of Kanawha County and original papers and a transcript of all the decrees, together with taxation of *costs*, were transmitted to filed and docketed in said Circuit Court of Kanawha County and certain proceedings were had in said cause in the last named court.

Afterwards the said cause, for reasons appearing to the last named Court, was transferred to the Circuit Court of Marion County and the original papers and pleadings and a copy of all decrees entered by the Circuit Court of Kanawha County in said cause, together with the transcript transmitted from the Circuit Court of Logan County, were transmitted, filed and docketed in the said Circuit Court of Marion County, where the cause is now pending and undetermined. Plaintiff refers to the several decrees made in said cause and to the pleadings *and* other papers filed therein.

Plaintiff further complains and says that a portion of the Robert Morris Grant of 500,000 acres extended across the said 142,000 acre tract leaving a portion of said 142,000 acres

above and east of the east boundary line of said Morris Grant and a portion of *to* west of the west boundary line of said Morris Grant. That portion of the grant of 142,000 acres covered by the Morris Grant of 500,000 acres is in dispute as to the right of redemption.

The defendant, Henry C. King, claiming the right to redeem the same and the successors of De Witt Clinton and *disouting* the right of the said Henry C. King to redeem any lands inside of the 142,000 acre grant.

Plaintiff further complaining says, that this Court by a decree entered on the 5th day of December, 1905, in the cause of this plaintiff against Henry C. King and others, settled and determined the boundary lines of the said Morris 500,000 acre grant, and the east boundary line as determined by said decree lies across the water shed of the right and left forks of Buffalo Creek, some distance further down the Creek or westerly from the boundary line as formerly claimed by Henry C. King.

Plaintiff is informed, believes and charges that the defendants named in the caption of this amended bill as defendants thereto are claiming interests, or the right to redeem interests, in said De Witt Clinton grant of 142,000 acres and of the twenty-two *parcels* mentioned and described in the original bill and are made defendants to this amended bill that they may come in and assert their claims and protect their interest, if they have any.

Except that Robert Claypool, Roscoe Claypool, L. E. Browning, L. A. Browning, Harley Toler, Buren Browning and Hiram Boggess, who, as the plaintiff is informed and believes, assert no interest in the lands, but are cutting timber thereon without authority or the consent of the plaintiff.

The plaintiff is informed, believes and charges that Robert Claypool and Roscoe Claypool have entered upon that part of the said twenty-two parcels of land situate on the left fork of Buffalo and east of the Robert Morris 500,000 acres and also east or outside of the line as formerly claimed by the defendant Henry C. King to be the easterly boundary line of the said grant. That the defendant L. E. Browning has entered upon that portion of the twenty-two parcels situate between the two eastern boundary lines of the said Morris grant, the one as deter-

mined by this Court to be the true location of the boundary line and the one formerly claimed by the said Henry C. King to be such eastern boundary line, and is cutting and intends to remove large quantities of valuable poplar timber. That L. A. Browning, Harley Toler, Buren Browning and Hiram Boggess have entered upon that portion of said twenty-two parcels situate westerly of the easterly boundary line of the Morris Grant as determined by the decree aforesaid of this Court, are cutting down and intend to remove a large quantity of valuable poplar timber.

The plaintiff avers that it has a clear, indefeasible and undisputed legal and equitable title to said parcels of land and to the lands where the said defendants are cutting and removing timber. That none of said defendants, nor of said trespassers, claim or aver that said land is not forfeited to and vested in the plaintiff. The fact is, as plaintiff avers that said land has never been entered upon the land books of Logan County since the formation of the State of West Virginia in the name of any person whatsoever, and no taxes have been assessed thereon or paid, by any person whomsoever; that said lands are in a state of nature.

The plaintiff is informed believes and charges that Roscoe Claypool, who is assisting in cutting the timber, is an infant under twenty-one years of age; that none of said trespassers have a great deal of property and it would be extremely doubtful whether they could respond in damages to the State for the value of said timber which they are now cutting and intend to remove.

The plaintiff says that said land is not fit for agricultural purposes and is valuable chiefly for its timber and its coal; that there is a market for said timber at *good* price, but there is no means of transporting the coal to market and hence, there is no market for said coal; that the cutting and removal of the poplar timber from said land in part destroys the value of said land and the injury can scarcely be compensated in damages.

The plaintiff is informed that the said trespassers have cut between seven hundred and fifty and eight hundred poplar trees, ranging in value from \$3.00 to \$10.00 per tree, and unless they are restrained, as plaintiff is informed, believes and charges, said trespassers will continue to cut

and remove other poplar trees from said land until they shall have cut and removed all of the large and valuable poplar therefrom. *Siaid* trespassing defendants are hauling said timber on wagons and dropping the same on the banks of Buffalo Creek near the mouth where the same can be rafted and floated out of the Guyandotte River into the Ohio River and thence to the markets on the river below.

Plaintiff is advised that there is no person who has a right to redeem said land from the forfeiture, because the same was forfeited, *no* to the State of West Virginia, but was was forfeited to the State of Virginia, and became vested in the State of West Virginia on her formation, and that she is entitled to have the said lands sold and is entitled to the whole of the proceeds of the same, unless the former owner, his heirs or assigns, should appear within two years after the sale and make proper allegations and proof to entitle him to the excess of proceeds above taxes, interest and *cots*.

The Plaintiff is informed that said trespassers claim to have obtained the consent *ot* the defendants, S. S. Altizer, J. B. Ellison, E. T. England and Lee Joyce to cut and remove said poplar timber from said lands.

The plaintiff *therefor*, prays that the said Robert Claypool, Roscoe Claypool, L. E. Browning, L. A. Browning, Harley Toler, Buren Browning and Hiram Burgess, their servants, agents and all others be enjoined, restrained and inhibited from cutting or removing any timber whatsoever from said lands mentioned and described in said original bill herein and exhibits therewith filed and from rafting and putting into the Guyandotte River the poplar timber already cut from said land; that said timber be seized under an order of this Court, either by Special Receiver or by the Sheriff of Logan County, and the same be sold and the proceeds thereof brought into Court and paid to the plaintiff. That the prayer of the original bill be granted, and for such other, further and general relief as the Court may see fit to grant.

STATE OF WEST VIRGINIA

By E. M. SHOWALTER,

Attorney.

State of West Virginia,

County of Cabell, to-wit:

G. A. Porter, being first duly sworn deposes and says that he has read the foregoing bill and knows the contents thereof; that he has personal knowledge of the cutting and removal of the poplar timber alleged and set forth in said bill by the defendants herein named; that the facts and allegations in the bill are true as they are therein stated, except so far as they are therein stated to be upon information and so far as they are therein stated to be upon information he believes them to be true.

G. A. PORTER.

Taken, subscribed and sworn to before me in the County and State aforesaid, this the 29th day of September, 1906.

C. W. CAMPBELL,
Notary Public.

EXHIBIT NO. 19.

In the Circuit Court of West Virginia for the County of Logan.

State of West Virginia,

vs.) In Chancery.

Alexander McClintock,
DeWitt Clinton, et als.

Answer of Henry C. King to the amended bill of complaint filed herein at the October term, 1906, and his supplemental petition herein.

To the Honorable Judge of said Court:

Now comes Henry C. King one of the defendants herein, by his counsel, and for answer to the amended bill complaint, filed at the October 1906 term, of the Circuit Court of *Marian* County, and while this cause was pending in said Court, or to so much thereof as he is advised it is material for him to answer, doth say:

1. That this defendant admits that the complainant filed her original bill herein, in the Circuit Court for the County of Logan, and instituted this cause in the manner set out in said amended bill, that this defendant filed a petition in said cause and became a defendant therein, and that said

cause was subsequently removed to said Circuit Court for *Marian* County, as set out in said bill, from which the same has been removed to this Honorable Court.

2. That this defendant denies that a portion of the Robert Morris 500,000 acre grant extends across the DeWitt Clinton 142,000 acre tract, mentioned in said bill, or that any portion of said 142,000 acre grant lies west of said 500,000 acre grant, but avers the fact to be that said 142,000 acre tract extends into and upon said 500,000 acre tract, which is older than and superior to said 142,000 acre grant, and overlaps the same to the extent of about 40,000 acres and does not extend beyond the same to the west thereof.

3. That all or the greater portion of the 22 parcels mentioned in said original and amended bills are situated within, and are a part of, said 500,000 acre tract, and, whether situated within the said exterior boundary lines of said 142,000 acre tract or not, are no part of said tract, because the same had previously been granted to Robert Morris and did not and could not pass to DeWitt Clinton.

4. That this defendant admits that the defendants L. E. Browning, L. A. Browning, Harley Toler, Buren Browning and Hiram Burgess have entered upon said so-called 22 parcels of land and at the time of the filing of said amended bill were cutting down and preparing and intending to remove from said land large quantities of valuable timber, and avers that such entry and cutting was and is a *wilful*, unlawful trespass, without color of legal right or authority; *not* this defendant avers that the land on which said trespass has been and is being committed is entirely within, and is part and parcel of, this defendant's Morris 500,000 acre grant.

5. That this defendant admits and avers that said land is in a state *or* nature and is unfit for agricultural purposes and is valued chiefly for its timber and coal; that there is at present no means of transporting said coal to market; that the cutting of said timber removes and destroys, in part, the value of said land and is an irreparable injury thereto; that said trespassers and insolvent, and that said timber is worth at least from \$3.00 to \$10.00 per acre.

6. That this defendants admits that none of said tres-

passers and none of the defendants deny that said DeWitt Clinton grant is forfeited, and admits that no one has any right to redeem said grant, or to redeem said land under said grant, or by virtue of any pretended claim of title *derived* from said DeWitt Clinton, both because the said land was never part of the said 142,000 acre grant, and because there is no law to permit redemption of land forfeited before the formation of West Virginia; but this defendant denies that no one has any right to redeem the land in question, and avers that he, this defendant, has the right to redeem the same as part of said Morris Grant, if the said grant is forfeited, which this defendant denies, and he denies that the complainant has any legal or equitable title to said land. But this defendant says that, if complainant has any title thereto, this defendant has a good and valid equitable title thereto and right of redemption thereof, superior to any other person.

7. That this defendant denies that said Court, by a decree entered on the 5th day of December, 1905, or at any other time, or in any other way in the cause of complainant against Henry C. King and others, or in any other cause, settled or determined the boundary lines of said Morris 500,000 acre grant as between the complainant and this defendant, or that the said *boundry* has been settled as between them in any manner, except by the decree entered in the Circuit Court of Wyoming County on the 30th day of September, 1897, and subsequently affirmed by the Supreme Court of Appeals of West Virginia, in the cause of State of West Virginia vs. Henry C. King, et als, as hereinafter set out.

8. That none of the defendants of this suit, except this defendant, has any species of title or right to said land; and the complainant has no right to sell the same, this defendant being ready and willing to pay all taxes properly chargeable thereon, with interest and costs not heretofore paid.

For further answer to said bill, and in further support to the right and claim of this defendant to said land, the defendant doth further say:

9. That prior to the 10th day of October, 1794, Wilson Cary Nicholas and Jacob Kenny had entered a certain tract of land on the waters of Guyandotte and Sandy

Rivers, then partly in Wythe County Virginia, which was afterwards assigned and patented to Robert Morris and known as the Robert Morris 320,000 acre grant, the northwestern *boundry* line of which extended from four white oak trees on the northwest bank of Knox Creek, now in Buchanan County, Virginia, near the mouth of what is known as White Oak Camp Branch of Knox Creek, N 33 E to two poplars and two chestnut trees on the bank of Muzzle Creek, now in Wyoming County, Virginia, a branch of Guyandotte River; and said Nicholas had entered another tract of 480,000 acres lying north of the 320,000 acres and binding on the same, the western *boundry* line of which 480,000 acre tract, as called for in said entry and in the survey subsequently made and in the grant subsequently issued, ran north 6300 poles from the said two poplars and two chestnut trees, which were a common corner to two said tracts. By an entry made on the said 10th day of October, 1794, said Nicholas having purchased from the Commonwealth of Virginia certain land office treasury warrants which entitled him to 500,000 acres of waste and unappropriated land of the Commonwealth, entered 120,000 acres thereof adjoining said 320,000 acre tract and 480,000 acre tract, the surveys of both which had then been reported, to begin at said two poplars and two chestnuts and be bounded by said two tracts "on the east and south and to extend from the same north and west for quantity" and on the 13th day of said October, 1794, made a further entry of 380,000 acres adjoining the one last mentioned on the north "to extend north and northwest from the same for quantity to be together with said entry laid off in one survey, to contain 500,000 acres". On the 28th day of the same October, 1794, a survey of said entries, and purporting to embrace 500,000 acres, was reported by the County Surveyor of Wythe County, Virginia, in which said entries were made, and said Nicholas afterwards assigned to the said Robert Morris all his right under said entries and surveys, which survey and assignment was duly filed in the land office at Richmond, Virginia, and on the 23rd day of June, 1796, the Commonwealth of Virginia issued to the said Robert Morris her grant based thereon, in due form of law and duly registered in the said land office; in and by which it was declared that said Commonwealth granted thereby to

said Robert Morris 500,000 acres of land. The complainant now herein claims by her amended bill that the *boundries* of said grant have been "so settled and determined" as that the said Commonwealth granted, not 500,000 acres, but less than 90,000 acres to said Morris by her said grant.

10. That said grant, and the certificate of survey which was assigned to Morris as aforesaid, described the tract of land as being bounded by said 480,000 acre tract and said 320,000 acre tract and by four other straight lines of given lengths and stated to run in certain directions, and the same are so laid down upon the plat accompanying said certificates of survey, and said lines are stated to cross various streams in certain manners, and from said plat appeared to do so; but when said land is surveyed out from the well-known and unquestionable corners of said 320,000 acre tract, some of the streams that are mentioned in said grant are found to have no existence others are miles away from the locality indicated; others are found to be flowing almost opposite to their supposed courses, others, of the names mentioned, were not known by those names at the date of the grant and survey, and neither of the lines called for nor any other straight lines, of any length or direction, can be run so as to conform calls for stream-crossings; nor can any land whatever be ascertained by reference only to the monuments mentioned in the grant; but by the courses and distances given, running from established corners of said other grants, the location of said 500,000 acre grant is easily determined, and is found to embrace all or nearly all the said so-called 22 parcels.

11. That at the time said land was entered and granted, as aforesaid, the said land and the county for many miles around, was an unexplored *wilderness*, of which the real geography and topography were unknown, and of which there were no means of accurate public surveys, and even the approximate relation to each other of such natural objects as then had names was not *publically* or generally *known*, and the said Robert Morris was not a resident of the said locality, and had no acquaintance with it at the time said certificate of surveys was assigned to him and the grant thereon issued.

12. That it appears from the circumstances connected with the *entried* and the alleged survey of said land, and

from the now known geography of the country, that the County Surveyor of *Wyth* County did not actually survey and run out said tract of land upon the ground or have any correct knowledge concerning the creeks and rivers mentioned in said certificate of survey, except upon one line thereof common to said tract and to said 320,000 acre tract, and that he platted and projected said survey upon the said line of said 320,000 acre tract as a base line by such other lines as would enclose the quantity called for in said *entry*, and called for the streams upon the other line of the tract at random and through mistake, ignorance or fraud, and made and returned a map and field notes that, so far as the streams are concerned, had no counterpart on the earth's surface.

13. That the said plat assigned with the certificate of alleged survey to Robert Morris, and filed in the land office aforesaid, bears upon its face the assertion that the area of said survey is 500,000 acres: "Area 500,000 acres", and the lines laid down thereon, with the courses and lengths thereof stated thereon as given in the certificate and in the patent, will embrace and inclose just that area, and the said Morris paid for, and the Commonwealth received pay for, 500,000 acres and issued her grant professing to convey 500,000 acres; and the said Morris and his successors and the said Commonwealth relied upon the statement of area and the length and direction of the lines given and treated said grant as a grant of 500,000 acres; and not as a grant of only 90,000 acres or less; and so did the State of West Virginia always until the filing of said amended bill.

14. That this defendant is advised and doth aver that it was the intention of said Morris to acquire from the Commonwealth the quantity of land for which the entries and surveys called, and to which he was entitled, lying west and northwest of the two tracts he already owned, and binding on the sale; and that it was the intention of the Commonwealth to convey to said Morris 500,000 acres, as stated in said grant, and that said Commonwealth did convey to said Morris, and vested in him her title to all the land lying west and northwest of the said two tracts previously granted to him that is or can be enclosed by the *coundary* lines given in said grant, located by their stated lengths and courses, and

varied only in such manner as to connect with the other two tracts.

15. That in the said year 1795, said Rooert Morris sold, granted and conveyed said grant to James Swan, of Massachusetts, as 500,000 acres, and the agents and public officers of the Commonwealth charged said land to said Swan upon the land books as 500,000 acres, and charged and executed from said Swan taxes upon 500,000 acres and not from 90,000 acres or pay less than 500,000 acres; and said Swan paid said taxes so charged continuously for 16 years, and then, the taxes being charged and returned delinquent for the years 1812-1814, as on 500,000 acres, the title become vested in the Literary fund. On March 15, 1838, Swan having died in the meantime, greatly indebted to various persons, mostly French officers who have given aid to Virginia and other colonies in the struggle for independence, or the descendants of such officers, leaving nothing but said land and other tracts in Virginia, which had likewise been forfeited, out of which to pay said indebtedness, the Legislature of Virginia, moved by consideration of the services of said officers and of Swan himself, who had been a Revolutionary soldier and officer, released the back taxes on said grant and granted the title thereto to John Peter Dumas, in trust for the benefit of the creditors of said Swan; and thereupon and thereafter the said Commonwealth charged, exacted and received from said Dumas and his successors taxes upon said grant, as 500,000 acres of land, down to 1856, or *laters*, and 300,000 acres of the same, and undivided interest was taxed as a separate parcel down to the time of the formation of Virginia, and later.

16. That after the formation of the state of West Virginia, which succeeded to the rights and liabilities and disabilities of the Commonwealth of Virginia, and said land was entered upon the land books of said State and taxed as 500,000 acres, and the payment of taxes on 500,000 acres for many years succeeding the year 1865 were exacted from the predecessors in title of this defendant, in some instances by attempted sales and purchases by the state, from which the said owners were obliged to redeem said land. And all taxes chargeable upon said grant were exacted and paid as upon a 500,000 acre tract, and not

upon 90,000 acres or any less than 500,000 acres, down to and including the year 1883.

17. That after the said Commonwealth of Virginia made to said Robert Morris said grant of 500,000 acres as aforesaid, to-wit: On the 14th day of February, 1796, she issued to DeWitt Clinton letters patent *purportion* to grant to said Clinton 142,000 acres within the exterior *boundries* of a survey of 182,000 acres out of which 40,000 were reserved on account of prior claims, said grant purporting to lie in Montgomery County, but lying in fact, in whole or in chief part of Kanawha County, and upon the creation of Logan County, in 1824, the same fell into that county. That part thereof was subsequently embraced in Poone County upon its formation in 1847, but all the land affected by this suit is situated in Logan County.

18. That your petitioner is informed and believes, that upon information and belief alleged, that no taxes were ever paid upon the said 142,000 acre grant to the Commonwealth of Virginia, and that the said grant became forfeited for the non-payment of taxes in the first few years of the nineteenth century and long before the formation of Logan County, and that no part of said grant was ever entered upon the land books of said County at any time, nor upon the land books of any County in West Virginia after the formation of said State, and that for nearly a century said grant had been forfeited and irredeemable; whereas all taxes chargeable upon this defendant's said Morris grant up to 1884 have been fully paid to said State.

19. That the State of West Virginia has no other or different right with reference to the said Morris Grant and those who claim under the same then the Commonwealth of Virginia had, or would have if the territory now embracing the part of said grant now in question had not been separated from said Commonwealth; and this defendant is advised and doth aver that the said Commonwealth was bound and estopped by her grant to Morris from disputing his claim, title or right to 500,000 acres of land, or to so much thereof as may be contained within the lines stated in the patent therefor to bound and describe said land, located most favorably to said grantee, and is likewise estopped by her subsequent exaction of taxes and other conduct aforesaid; and that the said State of West Virginia complainant

herein, is also and to the same extent estopped thereby and cannot be permitted to repudiate and nullify said grant to the extent of more than four-fifths thereof, in order that she may sell to another and take from this defendant, the successor in title of Robert Morris, land for which said Morris or those under whom he claimed, paid full consideration and purchase price, and upon which his successors paid the State for so many years her taxes, and which he had, and which this defendant has, good right in law, and particularly in equity, to claim and have under said grant.

20. For further reasons why complainant is estopped from denying this defendant right to the land and timber mentioned in said amended bill this defendant further says:

21. That soon after the original bill herein was filed this defendant filed his petition and answer, as stated in said amended bill, claiming the said land under said Morris grant, claiming that said grant was not forfeited, setting out, in part, his chain of title thereto, and offering to pay all taxes and proper charges on said land and to redeem the same if the Court should be of opinion that said land was forfeited; and before any adjudication was had upon this defendant's claim, or upon any other matter and no adjudication upon any matter nor any final action upon any matter or question has ever yet been had herein—the complainant brought a chancery suit against said defendant in the Circuit Court of Wyoming County for the purpose of selling said Morris grant upon the claim that the same has been forfeited for the non-charging of taxes thereon since the year 1883, and this defendant filed his answer thereto in which he made claim to said 500,000 acre grant, setting out his title thereto and *avering* among other things, that the true and proper location of the Morris grant is as follows:

“The said line running west from the corner on Knox Creek at four white oaks extends west its full distance of 3,840 poles, and that from the western terminus of this line the next call of said survey runs as stated in said patent north 8,000 poles, with a variation of four degrees east; that said line will cross the Tug Fork of Sandy River near the mouth of the Creek now called Thacker's Creek, and extend to a point near the head of the Elk fork of Pigeon Creek; thence N 10 E with the variations of four degrees

east, 4450 poles to a point near Trace branch of Smoke House Fork of Hart's Creek; thence S 62 E 5, 773 poles crossing the Guyandotte River near the mouth of Big Creek and to the head of *Stanlry* Fork, Spruce Fork, Cole River, to connect with the northern terminus of the closing line of said survey, reversed, running north 6,800 poles with a variation of four degrees east, from the beginning corner, two poplars and two chestnuts on a branch of Guyandotte River, known as the left hand fork of Muzzle Creek, in Wyoming County, West Virginia; a plat of said survey showing said *boundries* is filed herewith as part of this answer, marked "Exhibit Plat A".

The complainant replied generally to said answer and proof was introduced by complainant and defendant upon the question of the proper location and *boundries* of said grant, this put in issue.

22. That prior to the filing of said answer, and in order that said Circuit Court for Wyoming County might be advised for the pendency of this suit and of its effect upon the land herein question and of the complainant's right thereto, the attorney who had instituted and was conducting this suit on behalf of the complainant appeared and presented to the Court the bill herein and this defendant's petition and answer thereto, and the record of the proceedings herein up to June, 1896, so that the said Court was fully advised of the claims and rights of the complainant, the said State of West Virginia, under said 142,000 acre grant, as well as under said 500,000 acre grant, and was advised and informed by the record before it that an overlap of the exterior lines existed between said two tracts, and of the extent of said overlap according to the contention of this defendant, was fully advised in the *premised*.

23. That on the 30th day of September, 1897, said cause was heard by said Circuit Court for Wyoming County and a final decree entered therein wherein, among other things, it was decreed that this defendant had the right to redeem the portion of said Morris 500,000 acre grant that is situated in West Virginia, so far as the title thereto was vested in the said state: that the said grant is properly bounded by certain monuments, abutments and lines therein particularly set out and described, and which were and are the same as the lines stated in this defendant's answer filed

in said suit as aforesaid and laid down on the map referred to as "Exhibit "A", and which lines include and embrace the land and timber affected by complainant's amended bill herein; that the taxes, interest and costs chargeable upon said land, the payment of which was necessary to the redemption thereof, was the sum of \$3,090.08, which this defendant was declared to have paid, and which he had paid, and that said land was by this defendant by said payment and said decree fully redeemed. Said decree was further decreed that no part of the land described be sold by or on behalf of said State.

24. That the said sum of money paid to complainant as stated in said decree has not, nor has any part thereof, been *refused* to this defendant or otherwise applied to his uses, but the same and every part thereof has been received and retained by the complainant and converted to her own uses and purposes and put beyond the reach of this defendant.

25. That subsequently an appeal from said decree was sued out of the Supreme Court of Appeals of West Virginia on behalf of complainant therein, and among other alleged errors complained of it was alleged and contended on behalf of said State that said redemption was "not according to the patent, but according to the metes and bounds as laid down by *thw* witness Sell", who had *survey* said grant and made said map; and that, "the redemption was in violation of the patent to said 500,000 acre tract and in conformity with the theory of the witness Sell". But upon the hearing of said appeal the said Supreme Court of Appeals found said decree to be erroneous only in respect to the amount of taxes and interest chargeable and paid, and in declaring a redemption by the payment of said sum, in which respect said decree was reversed and in all other respects the decree was affirmed. Copies of said decree of said Circuit Court for Wyoming County and of said decree of the Supreme Court of Appeals are filed herewith and made hereof and marked respectively "Exhibit B" and "Exhibit C".

26. That said decree of said Supreme Court of Appeals has never been set aside nor in any way modified, and the said decree of the Circuit Court of Wyoming County has never been set aside, reserved or *momified* in any respect,

except to the extent aforesaid, and all the adjudications and findings of said decree, except as to the amount of taxes and interest chargeable in redemption of said Morris grant, are, and ever since the affirmance thereof, have been, a binding and conclusive adjudication that this defendant had and has the right, superior to all others, to redeem any and all land within the boundary described in said decree and laid down on said "Exhibit A", to which the title was then vested in the said State, which include the land in question herein, if said Morris grant be forfeited, and that, so long as this defendant is willing to pay the proper taxes and interest chargeable thereon since 1883, the said State has no right to have any part of this land sold, and no Court has the lawful authority to order or allow the same to be sold without the consent of this defendant; and this defendant pleads said decrees in bar of the right of complainant to a sale of said land or to make any disposition of the said timber except to order the same to be turned over to this defendant, or to be held or disposed of for his benefit.

27. That the mandate of said Supreme Court of Appeals upon the appeal aforesaid remanded said cause to the Circuit Court for further proceedings for a proper redemption of the land described in said decree, or of such parts thereof as this defendant should particularly locate and describe and wish to pay the taxes upon, and after the redocketing of said cause and the re-entering of said mandate in said Circuit Court, the same was removed to the Circuit Court of Logan County, and afterwards to the Circuit Court of Cabell County.

28. That while the cause was pending in said Circuit Court of Logan County, sundry persons prepared a so-called "Fifth Amended Bill", in the name of the complainant, and supplied the same to John S. Marcum, Esq., then the counsel for the complainant, who, at the request of said persons, and on the motion or in behalf of the State, submitted to the said Court the question whether the said amended bill, should be filed and the Court ordered that the same be filed and that process issue thereon. The said bill did *not* originate with or *emanate* from the complainant therein and was not prepared or presented on behalf of the State or for any purpose of the State, and the State did not ask leave or move that the same be filed, and said bill con-

tained no allegation whatever concerning the location, extent or boundaries of said Morris grant, nor any complaint of any matter adjudged by said former decree in said *couse*, and contained no allegation or matters that raised or could raise any issue with the defendant or any other person as to the boundaries or location of said Morris grant; and said bill was devised solely for the purpose of certain persons therein named as defendants and not for any purpose of said complainant, and was *not* in any legal sense the bill of the State.

29. That after the removal of said cause to Cabell County a decree of reference to Commissioner John T. Graham was made at the joint instance of the complainant and said other persons for the purpose of ascertaining various matters therein prompted. The first four of the requirements of said decree related to matters within the purview of the mandate of said Supreme Court of Appeals and upon which inquiry by the State was not concluded, and none of which related to the location of said Morris grant, or directed any inquiry thereinto; the last nine of said requirements are declared to have been made "on motion of the defendants other than Henry C. King, answer at this term and others who may hereafter appear herein" in which motion the State did not *join*, all which nine requirements related to matters directly or indirectly passed upon and adjudicated by said decree of September 30, 1897, or were new in the case, one of said requirements being that said Commissioner "inquire, ascertain and report and true and correct location of said Morris grant", with the special provision that "the costs attending the foregoing nine requirements asked for by the defendant shall not be paid for by the State".

30. That after the entering of said decree of reference said Commissioner, against the protest of this defendant entered upon an inquiry as to the "true and correct location of the said Morris grant", and a vast amount of evidence, oral and documentary, was taken, and sittings held at a great many places at different times extending over several months, but no evidence was offered upon behalf of the State upon the question of the *boundry* of said grant or any other questions, nor did the said State by Counsel or otherwise attend said hearings or participate

in said inquiry in any manner nor treat the same as a matter in which she had any legal concern. At the conclusion of the evidence taken by said Commissioner upon the question of *boundry* he made his report in which he found and reported a location of said Morris grant but slightly different *from* that decree and established by said decree of September 30, 1897, to be the true location, and one that included all of the said 22 parcels in question herein that are within the *boundries* and locations fixed by said decree; and although all the other parties to said suit, this defendant included, except to the said finding and report, the said State made no exception or objection thereto and took no action thereon, and at the hearing of said cause upon said report and exceptions neither resisted or supported either the report or the exception thereto made by other parties.

31. That after the said hearing upon said report and exceptions the said Circuit Court for Marion County entered a decree by which it *undertood* to give the said 500,000 acre grant a location totally *variant* from that given by the Circuit Court of Wyoming County and affirmed by the Supreme Court of Appeals, as aforesaid, and by which said grant would contain a total area of only about 90,000 acres. But this defendant says that said decree, so far as the complainant and this defendant were concerned, was entirely without any pleading, allegation or issue to support it, and he is advised and doth aver that the said decree was without jurisdiction in the Court to render it and is null and void and is not binding on this defendant or this Court nor available to the complainant, and he further avers that said decree is erroneous, null and void for all purposes.

32. That this defendant's predecessors in title had not only caused the said Morris grant to be entered upon the land books of the proper counties and paid the taxes charged thereon before the adoption of the Constitution of West Virginia, but immediately after the adoption thereof, requiring the owners of land to enter the same upon the land books of the County in which it is a part of it is situated, and caused the same to be charged with taxes, to-wit: in the years 1872 and 1873, and caused said 500,000 acre grant to be entered upon the land books of Logan and Wyoming Counties and to be charged with taxes, which they paid;

and this defendant is therefore advised, and doth aver, that the duty imposed upon the said owners by the Constitution was discharged, and that said grant has never been and is not forfeitable under said constitution.

33. That some years after the adoption of said Constitution the taxes on said grant being returned delinquent for non-payment, the sheriff made an attempt but invalid sale of said land to complainant, and afterwards a proceeding was instituted in said Circuit Court for Wyoming County to sell said grant, in which proceeding, Robert E. Randall, Trustee, this defendant's predecessor in title, appeared and filed a petition and paid up all the taxes chargeable upon said land up to and including the year 1883, and a decree of redemption was entered reciting said payment and declaring a release of all claims of the complainant for taxes and forfeiture up to and including the year 1883.

34. That said decree directed the Clerk of said Circuit Court to certify a copy of said decree to the Auditor of the State and also the assessor of the proper assessment district, in order that the said land be again charged with taxes, and the said Clerk did certify that said decree to said Auditor on or about the 16th day of June, 1883, but whether he certified the same as the assessor or not this defendant is not informed, but he is advised that it is immaterial whether he did so or not, as the assessors were not at that time charged with the duty of entering land on the land books had an authority to do so. This defendant is advised that it was also the statutory duty of the Clerk of said Court to certify to the Clerk of the County Court of said Wyoming, Logan and McDowell Counties copies or abstracts of said decrees, and of the Auditor, to whom said decree was certified by the Clerk of said Circuit Court as aforesaid, also to notify the said Clerks of said County Courts of said decree, in order that the said Clerks who were the legal custodians of the land books of the said counties, should re-enter said land upon said land books and charge the same with taxes, as they were required by law to do, the performance of any of which duties the said Randall, Trustee, could neither compel, aid or prevent; and of any of the said duties were not performed the said land not re-entered upon the land books and charged with taxes, such failure and omission was the fault and through the

default and neglect of the said State of West Virginia, and her officers and agents charged with the duties aforesaid, in whose choice or election this defendant and under whom he claims had no voice or part, and who did all that was reasonable in their power to have said land re-entered and charged with the taxes, and who were always willing to pay any taxes lawfully chargeable upon said land, wherefore, as this defendant is advised, no claim of forfeiture of said land can be maintained by or on behalf of said State.

35. That this defendant, while contending that said Morris grant is not forfeited and that the title to the land in question herein is vested in this defendant and not in the complainant, is willing, nevertheless, and hereby offers, to pay all taxes and interest justly chargeable upon that portion of the said Morris grant as is overlapped by the boundaries of said Clinton grant as said Morris Grant is located, and bounded and described in said decree of the Circuit Court of Wyoming County, entered on the 30th day of September 1897, as aforesaid, in *complainant's* said suit against this defendant, and is laid down upon said map referred to in said decree as "Exhibit A", a copy of which map is filed herewith as a part hereof, marked "Exhibit A" and to redeem said land from complainant's claim of forfeiture.

36. That certain monies have heretofore been paid into Court as the proceeds of the timber cut from the land in question herein and have been appropriated to the use of complainant, and certain other timber cut thereon has been disposed of by complainant, the exact amount of which timber and proceeds of timber is to this defendant unknown, for which this defendant is entitled to a credit upon the taxes and interest chargeable against said land:

Wherefore this defendant prays that it be adjudged and *decree* herein that this defendant has good right and title to all that portion of said Morris grant, which, as bounded and described in said decree of the Circuit Court of Wyoming County and delineated on said map marked "Exhibit A" lies within the exterior boundary lines of said Clinton 142,000 acre grant, and the right to redeem the same from the alleged forfeiture claimed by complainant by paying the taxes and interest justly chargeable

thereon and proper costs; that the Court ascertain the amount of such taxes, interests and costs, and permit this defendant to pay the same; and that there be deducted from said payment the proceeds and value of all timber cut upon said land pending this suit; that upon the payment of the balance of said amount, if any, a proper decree be entered declaring the redemption of said land by this defendant, and the release to him of all claim of the complainant thereto, and to the timber cut thereon and not heretofore disposed of, and that said timber be delivered up to him; that in the meantime said timber be held and preserved by a receiver of this Court to be appointed, or, if need be, in order to prevent loss or depreciation, that the same be sold under the order of this Court and the proceeds be applied to the payment of any balance there may be of taxes and interest chargeable, if any, after applying the proceeds of timber previously cut, and the residue thereof paid over to this defendant; and that this defendant have all further relief proper in the premises.

HENRY C. KING,
By MAYNARD F. STILES,
His Counsel.

State of West Virginia:

County of Kanawha to-wit:

Maynard F. Stiles, being duly sworn, doth say that he is the solicitor and counsel of Henry C. King, the defendant in the foregoing answer and petition; that he has read said answer and petition and knows the contents thereof; that the allegations therein contained are *true* except those stated to be upon information and belief and those he believes to be true, and that this verification is made by said affiant instead of said defendant, because affiant is more cognizant of the facts therein set out than is said defendant, and because said defendant is not a resident of and is not at present within the State of West Virginia.

MAYNARD F. STILES.

Subscribed and sworn to before me this day of November, 1906.

.....
Notary Public.

EXHIBIT NO. 20.

Decree of Reference.

And on another day to-wit on the 30th day of July, 1907, the following decree was made and entered:

State of West Virginia

vs.

Alexander McClintock, et al.

This day came the plaintiff, and on her motion, and it appearing to the Court that before the final determination of this cause it will be necessary to refer this case to a Commissioner in Chancery, and that it is now proper to refer the case to a Commissioner.

It is therefore adjudged, ordered and decreed, that this cause be and the same is hereby referred to Robert Bland, a Commissioner in Chancery of this Court. And said Commissioner is hereby directed to mature this cause for hearing before him by posting and publication of the notices and orders required in Section 8 of Chapter 105 of the Code of West Virginia in the manner therein required; and after said notice is properly posted and published as prescribed in said Section, said Commissioner shall proceed with all reasonable diligence and report the following matters to this Court:—

First:—Said Commissioner shall ascertain and report whether or not the grant of 142,000 acres made by the State of West Virginia to DeWitt Clinton and described in the pleadings in this cause is forfeited to this State, and if so, when it became forfeited to this State or the State of Virginia.

Second:—He shall ascertain and report how much and what parts of said grant of 142,000 acres is now liable to sale for the benefit of the School Fund of West Virginia. And if a less quantity than the whole is *liable* to sale he shall report an accurate description showing the location by metes and bounds of the part or parts so liable.

Third:—He shall report the amount of taxes, interest, cost and damages and the several funds to which they respectively belong, properly chargeable against the land found by him to be liable to sale for the benefit of the School Fund.

Fourth. He shall also report what portion, if any, of the DeWitt Clinton survey is held by persons whose *titled* are protected by Article No. 3, Section 13 of the Constitution of West Virginia.

Fifth:—He shall report whether or not any portion of the DeWitt Clinton survey has been sold in proper proceedings by the Commissioner of School Lands of Logan County.

Sixth:—He shall ascertain and report the amount of timber, if any, that has been cut off of said grant since said land became forfeited to the State of West Virginia, and what disposition has been made of the money derived from said sale; and

Seventh:—He shall report who, if any one, is entitled to redeem said survey or any part thereof so far as the title remains in the State, or who, if any one, is entitled to the excess of the purchase money for which said land may be sold, over the taxes charged and chargeable thereon or which, if the land had not been forfeited, would have been charged or chargeable thereon, since the formation of this State, with interest at the rate of twenty per cent (12%) per annum, and the costs of the suit.

And said Commissioner may make and file his report as to any one or more of the tracts or parts thereof mentioned in the Bill at any time without waiting to complete his report as to the whole of said tract.

Said Commissioner may also report any other matters which he may deem pertinent or which any party in interests may require in writing.

EXHIBIT NO. 21.

In the Circuit Court of Logan County, West Virginia.
State of West Virginia,

vs.) In Chancery.

Alexander McClintock, and others.

The petition and Answer of the Buffalo Coal & Coke Company, a West Virginia Corporation and the Altizer Coal Land Company, a West Virginia Corporation, to the original and amended bills of complaint filed in the above entitled cause, and the answer of Henry C. King.

To the Honorable John B. Wilkinson, Judge of said Court:

These respondents, the said Buffalo Coal & Coke Company, a corporation, and the Altizer Coal Land Company, a Corporation, Not waiving the many imperfections, irregularities and inconsistencies contained in said bills and answers, but reserving unto themselves all advantages thereof; for answer thereto, unto so much thereof as they are advised it is material for them to answer unto, answering says:

The said Buffalo Coal and Coke Company and the Altizer Coal Land Company, petition this Court to be allowed to become defendants to the above styled suit and to be allowed to file this, their joint and separate answer to the plaintiff's Bill of complaint and the answer of Henry C. King.

The said Buffalo Coal and Coke Company and the Altizer Coal Land Company are the owners in fee simple of all the land mentioned and described in the twenty two descriptions filed with the Plaintiff's bill of Complaint, and to all the *DeWit* Clinton Survey of 142,000 acres, granted on the 19th day of February, 1796 by the Commonwealth of Virginia to said *DeWit* Clinton that is not embraced and included within the boundary of the hereinafter mentioned junior patents and School Land Sales, protected by the Constitution and Laws of the State of West Virginia.

That the Buffalo Coal and Coke Company owns in fee simple all that boundary of Land between Main Buffalo Creek and Huff's Creek, aggregating 8481.73 acres and which land is definitely described as tracts No. 3, containing 4149.73 acres and No. 4 containing 4292 acres, and 40 acres described as situate near the mouth of Muddy Rock House Branch, in a deed dated the 8th day of June, 1907, from W. K. Cowden, Trustee, and others to the Buffalo Coal and Coke Company, a corporation, which deed is of record in the Office of the Clerk of the County Court of Logan County, West Virginia, in Deed Book No. 28, at page 457 &c. a duly certified copy of which deed is herewith filed as a part of this answer and Petition, Marked Exhibit No, and that all of said land so owned by the Buffalo Coal and Coke Company described as tract No. 4, containing 4292 acres and the forty acres near the mouth of Muddy Rock

House Branch and all of tract No. 3, containing 4149.73 acres, except 10009.2 acres described in the description set out in the next paragraph are within and part of a tract of 20,000 acres sold by the State of West Virginia in the School Land proceeding of the State of West Virginia against Jesse R. Irwin, et al to W. H. Stoddard and Amos C. Hall upon which the taxes have been regularly paid since said sale and is now owned by the Buffalo Coal and Coke Company under and as successors in title of said Stoddard and Hall and is not liable to sale or redemption in this cause.

The land owned by the Buffalo Coal and Coke Company and embraced in this suit not within the 20,000 acres sold to Stoddard and Hall is described, to-wit:

Buffalo Coal & Coke Company; Parcel No. 1

Beginning at a sugar tree $7\frac{1}{2}$ mile tree on the Rutter and Etting line, thence with the same N 3 30 E 550 feet to a stake of the Hector survey 100 poles from the center of the Buffalo Valley thence with the lines of said survey keeping 100 poles from the center of said valley N 72 15 W 230 feet to a stake 100 poles from the center of the valley, N 50 00 W. 313 feet to a stake N 82 15 W. 964 feet to a stake, N. 72 15 W 590 feet to a stake, N. 62 10 W 800 feet to a stake, N. 48 30 W 990 feet to a stake, S. 52 30 W. 280 feet to a stake, S. 31 45 W 130 feet to a stake, S. 5 00 W 285 feet to a stake, due south 540 feet to a stake, S 7 00 W. 450 feet to a stake, S. 14 00 W 320 feet to a stake, S 21 00 W 310 feet to a stake, S. 28 30 W 560 feet to a stake, S 40 00 W 1230 feet to a stake, S 54 15 W 750 feet to a stake, S 57 00 W 700 feet to a stake, S 44 45 W 700 feet to a stake, S 60 W 570 feet to a stake, S 68 05 W 325 feet to a stake, S 76 10 W 325 feet to a stake, S 86 00 W 290 feet to a stake, S 81 15 W 870 feet to a stake, S 78 30 W 710 feet to a stake 100 poles from the center of the Valley, N 78 15 W 960 feet, N 80 30 W 320 feet to a stake on the 5th line of the Morris survey as run by W. D. Sell, thence with the 100 pole line N 80 30 W 370 feet to a stake, N 62 00 W 780 feet to a stake, S 32 30 W 140 feet to a stake, S 30 00 W 380 feet to a stake, S. 27 00 W 580 feet to a stake, S 35 00 W 560 feet to a stake S 56 45 W 540 feet to a stake, S 65 30 W 465 feet to a stake, S 70 30 W 245 feet to a stake in the Pomeroy line, thence with the

same S 82 15 E 6170 feet to a cucumber in Robinette branch, the 17 mile corner of the said line, thence N 89 20 E 8139 feet to a stake in the Rutter & Etting line, thence with the same N 1 30 W 4930 feet to the place of Beginning Containing 998.4 acres.

C. J. PEARSON, *Surveyor*.

Buffalo Coal & Coke Company; Parcel No. 2.

Beginning at a stake in the Pomeroy line, thence N 59 00 W 740 feet to a stake, thence N 45 00 W 430 feet to a stake, thence S 61 00 W 940 feet to a stake in the Pomeroy line, thence with the same S 82 15 E 1780 feet to the place of beginning. Containing 10.8 acres.

C. J. PEARSON,
Surveyor.

Buffalo Coal & Coke Company; Parcel No. 3.

Beginning at a stake on the ridge between Coal and Guvandotte rivers, thence S 46 35 E 1460 feet to a stake with two chestnut oak pointers on said ridge, thence leaving the ridge N 63 10 E 2117 feet to three lynns on the Wolf Pen Branch of Adkins Fork, corner to the Mary H. Mullins 666 acre tract, thence with the same S 25 15 E 1317 feet to a beech on the bank of Adkins fork, thence S 10 30 W 2641 feet to a stake on a hillside, thence S 37 35 E 2954 feet to a gum on a point, thence S 4 00 W 1560 feet to a hickory on a hill side, thence S 64 10 E 645 feet to a lynn and chestnut oak pointers corner to tract No. 1 of the McClintock land, thence S 54 00 W 453 feet to a stake on the dividing ridge between waters of Spruce and Dingess Run, with two small black oak pointers, thence S 68 30 W 155 feet to a stake on said ridge, thence N 21 30 W 990 feet to a black pine, thence due North 561 feet to a gum and chestnut oak on the Adkins Fork side of the ridge thence N 30 00 W 1419 feet running through heads of drain of said Adkins Fork to a double black pine on a ridge near a field, thence N 42 00 W 1881 feet to a black jack, thence N 70 00 W 1023 feet to a large chestnut oak and small locust, thence N 30 00 W 412.5 feet to a large chestnut oak in end of a flat, thence N 14 30 W 561 feet to three small chestnuts, thence S 82 00 W 231 feet to three chestnut oaks on the ridge, thence N 20 E

630 feet to a stake, thence N 24 08 W 2600 feet to the place of beginning. Containing 257.5 acres.

C. J. PEARSON, *Surveyor*.

—a—

That the Altizer Coal Land Company is the owner in fee simple of tract No. 1 containing 2698.85 acres and tract No. 2 containing 137.4 acres, in the deed dated the 8th day of June 1907, from W. K. Cowden, Trustee, and others referred to as Exhibit No. above.

That all the lands embraced in this suit on the Left Hand side of Buffalo Creek, going up, except the part described in the next *proceeding* paragraph are also within said 20,000 acres sold to Stoddard and Hall by the State of West Virginia in the cause aforesaid and is not liable to sale or redemption in this cause.

The land embraced in this cause owned by the Altizer Coal Land Company not within the 20,000 acres sold to Stoddard and Hall, is described as follows, to-wit:

Altizer Coal Land Company, Parcel No. 1.

Situate on the north side of Buffalo, between the 500,000 acre

Fifth line of the Robert Morris survey as run by W. D. Sell in 1895 and the west line of the Rutter and Etting.

Beginning at a stake which bears South 86 15' W, 63 ft. from a large chestnut oak on the ridge between Buffalo and Spruce Fork on the West line of the Rutter and *Eddying* Survey, thence with said line

1. S 3 27" 1900 ft. to a stake, 100 poles from the center of the Buffalo Valley on a line of the Bruce Ballard tract of land (now owned by Crawford and Ashby and Others) thence with the same keeping 100 poles from the center of said Valley,

2. N 83 00 W 780 ft. to a stake with white oak and poplar pointers in upper Field Hollow, corner to the land owned by McDonalds, thence with the same,

3. N 23 45 W 570 ft. to a stake, 100 poles from the center of said Valley,

4. N 35 15 W 365 ft. to a stake,

5. N 41 00 W 1000 ft. to a stake;

6. N 59 30 W 870 " " "

7. N 75 00 W 660 " " "

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|-----|--------------------|-------------|---|---|
| 8. | N 83 15 W 420 | " " | " | |
| 9. | N 89 30 W 400 | " " | " | |
| 10. | S 78 40 W 485 | " " | " | |
| 11. | S 67 40 W 485 | " " | " | |
| 12. | S 57 00 W 420 ft. | to a stake. | | |
| 13. | S 48 30 W 560 | " " | " | |
| 14. | S 25 30 W 560 | " " | " | |
| 15. | S 17 00 W 840 | " " | " | |
| 16. | S 58 30 W 400 | " " | " | |
| 17. | S 31 45 W 420 | " " | " | |
| 18. | S 31 45 W 335 | " " | " | |
| 19. | S. 23 25 W 385 | " " | " | |
| 20. | S. 15 05 W 385 | " " | " | |
| 21. | S 06 45 W 300 | " " | " | |
| 22. | N 5 00 W 470 | " " | " | |
| 23. | Due South 530 | " " | " | |
| 24. | S 40 00 W 430 | " " | " | |
| 25. | S. 54 15 W 300 | " " | " | |
| 26. | S 57 00 W 950 | " " | " | |
| 27. | S 44 45 W 440 ft. | to a stake. | | |
| 28. | S 81 15 W 290 | " " | " | |
| 29. | N 78 15 W 1200 | " " | " | |
| 30. | N 54 45 W 480 | " " | " | |
| 31. | N 71 00 W 160 | " " | " | on the East line of the
Robert Morris 500,000
Acre Survey as run by
W. D. Sell in 1895,
thence with same, |
| 32. | N 4 36 E. 4800 | " " | " | on a line of the lands
now owned by the
Spruce River Coal
Land Company,
thence leaving the
line of the said Robert
Morris, survey and
with the lines of the
said Spruce River
Coal Land Company, |
| 33. | N 63 00 E 2620 ft. | to a stake | | with a gum and chest-
nut oak pointer on
side of a knob, thence
with the ridge, |

34. S 72 00 E 627 " " " to a stake with two chestnuts and a gum pointer on the ridge,
35. S 3 25 E 720 " " " maple and locust on the ridge.
36. S 18 30 E 495 " " " stake with two chestnuts and black oak pointer on the ridge between Buffalo and Spruce, thence with same.
37. S 70 30 W 315.5 " " " a large chestnut oak and locust on the ridge.
38. N. 6546 E 804 ft. to a black oak in the gap on said ridge at the head of Perry Fork.
39. N 6 55 E 2264 ft. to a stake with a small chestnut oak and locust pointer,
40. S 82 30 E 2585 ft. to 2 hickories in Buzzard's Gap.
41. N 29 35 E 485 ft. to a triple chestnut on the ridge,
42. N 85 00 E 1192 ft. to a stake with 2 black oak pointers on the ridge.
43. S 28 00 E 1525 ft. to a stake with 2 chestnut, hickory and locust pointer on the ridge,
44. N 69 30 E 801 ft. to a chestnut and 2 black oaks on the ridge.
43. S 52 00 E 918 ft. to 2 chestnuts on said ridge.
44. N 86 15 E 130 ft. to Beginning, containing 671.6 acres.

C. J. PEARSON,
Surveyor,
April, 1907.

Altizer Coal Land Company, Parcel No. 2.

Situate on the ridge between the Spruce Fork of Little Coal River, between the Fifth Line of the Robert Morris survey, as run by A. B. Maupin in March 1903, and the same line as run by W. D. Sell in 1895.

Beginning at a stake in the North end of the Gap at a double chestnut and chestnut oak pointers, corner to the land now owned by the Spruce River Coal & Land Company, also corner to the Anthony Lawson 1450 acre survey, thence with the lines of the Spruce River Coal & Land Company.

1. S 63 45 E 970 ft. to an ash with a lynn and poplar pointers.

2. 9 00 W 1785 ft. to a stake with a chestnut oak and chestnut pointers on a hill side,

3. S 17 00 E 23 76 ft. to a stake with poplar pointers about 150 feet above Reed Hollow, thence down Spruce Fork,

4. N 24 00 E 760 ft. to a stake 100 ft. from said fork,

5. N 2 25 E 2311 ft. to a small sugar tree with birch and beech pointers on the bank of said Fork.

6. N 36 00 E 1324 ft. to a chestnut with two birches and white oak pointers on a hill side,

7. S 38 30 E 4723 ft. to a white oak walnut and beech pointers on the bank of Simms Fork,

8. N 63 E 550 ft. to a stake on a line of the Robert Morris 500,000 acre survey, thence with the same located by W. D. Sell in 1895,

9. S 4 36 W 3800 ft. to a stake 100 poles from the centre of Buffalo Valley, thence leaving the line of the said 500,000 acre survey,

11. N 80 00 W 800 ft. to a stake,

12. S 89 40 W 650 ft. to a stake,

13. S 80 15 W 400 ft. to a stake,

14. S. 67 40 W 410 " " "

15. S 60 30 W 470 " " "

16. S 66 00 W 320 " " "

17. S 59 30 W 480 " " "

18. S 37 30 W 480 " " "

19. S 32 30 W 550 " " "

20. S 30 00 W 330 " " "

21. N 45 00 W 850 " " "

22. N 69 30 W 900 " " "

23. N 77 30 W 500 " " "

24. S 85 30 W 490 " " "

25. S 77 00 W 670 " " "

26. S 60 30 W 40 " " " on the Fifth line of the said Robert Morris survey as run by A. B. Maupin in March 1906, thence with the same,
27. N. 1 55 W 2760 " " " on a line of the Oliver Browning 209 acre survey, *thence* with the same,

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28. S 77 00 E 135 " " " chestnut and hickory in a gap of the ridge between Rum Creek and Mud Lick,
29. N 54 00 E. 2201 ft. to a stake with chestnut oak and dogwood pointers on said ridge,
30. S 72 Co. E 1385 ft. to a sugar tree with two chestnut oak pointers on the ridge between Buffalo and Spring Hollow of Spruce Fork of Coal River,
31. N 19 10 E 709 ft. to a stake with two hickory pointers on a ridge.
32. N 4 00 W 727 ft. to a sugar tree by a rock on the south side of said Spring *Holloc*
33. S. 80 00" 1418 ft. to a stake,
34. N 52 00 W 3460 ft. to a stake on a line of the Anthony Lawson 1450 acre survey, thence with the same,
35. S 86 00 E 2615 ft. to a stake with a hickory, chestnut and maple pointers,
36. S 52 00 E 993 ft. to a stake with a chestnut and black oak pointers on hill side.
37. N 18 00 E 660 ft. to a stake with black oak and dogwood near pointers, the top of the ridge,
38. N 6 05 W 1140 ft. to a stake with chestnut oak pointers.
39. N 22 00 E 528 ft. to a stake with cucumber and chestnut pointers near the top of the ridge.
40. N 8 10 W 1502.5 to the beginning containing 1057.92 acres, exclusive of the John Burgess 49 acre patent, the Nathaniel Browning 40 acre Patent, and 5.16 acres which is

a part of the Nathaniel Browning 14 acre Patent, all which lie within the bounds of the above described Lot.

C. J. PEARSON, *Surveyor*,
April, 1907.

Altizer Coal Land Company, Parcel No. 3.

Beginning at a stake with a *hickor*, two poplars, yellow lynn and chestnut pointers, in the second left fork of Mud Lick Fork of Buffalo Creek, corner to the Joe Lowe tract and also corner to a 577 acre survey made for J. L. Chambers, (School Land), thence with the same S 56 04' W 4326 feet to a chestnut oak on the ridge between Rum Creek and the first left fork of said Mud Lick, corner to the M. L. Chambers 216 acre tract, thence S 60' 00" E 160.5 feet to a double chestnut on the ridge, S 79 00' W. 331.5 feet to a black oak on the ridge between Rum and Buffalo (Chestnut—the original corner dead), to S 50' W. 462 feet to a large chestnut on said ridge, S 43 50 W 1524.4 feet to a large chestnut on a knob on said ridge, N 73 20' W. 1124.7 feet to a stake with hickory and dogwood pointers on said ridge, corner to the Lewis Mullins 480 feet to a stake on the Emma I. Pomeroy line, thence with the same S 82 15' E 4440 feet to a stake on line of the Hector survey, thence with the same, keeping 100 poles from the center of Buffalo Creek Valley, N 30 30' E 1060 feet to a stake, N 52 15' E 1140 feet to a stake 100 poles from the center of the Valley on the Fourth Line of the Robert Morris survey as run A. P. Maupin in March, 1906 feet to a stake on line of the Oliver Browning 209 acre survey, thence with same N 77 00' W 800 feet to the Beginning, containing four hundred forty-four and one one hundredth (444.01) acres.

—b—

Motion to Dismiss.

The Petitioners, the Buffalo Coal and Coke Company and the Altizer Coal Land Company here move the court to dismiss from this suit all the lands described in the said deed dated June the 8th, 1907, and filed as Exhibit No., except the land embraced in the description of parcel No. one, containing 998.4 acres and No. 2 containing 10.8 acres, owned by the Buffalo Coal and Coke Com-

pany, and parcel No. 1, containing 671.6 acres, and parcel No. 2 containing 1057.93 acres, and parcel No. 3, containing 444.10 acres, owned by the Altizer Coal Land Company.

That the motion to dismiss said land is based upon the following facts and adjudication, to-wit: That on the 28th day of July, 1893, Jesse R. Irwin, Alvin Irwin and Marie E. Hoyt and husband who claimed under a sale made to Jesse R. Irwin in Wyoming County of 40,000 acres of the unprotected portions of the 480,000 acre grant to Robert Morris as located by Wm. T. Sarver, conveyed 20,000 acres to Emma Idelia Pomeroy, described as follows, to-wit:

“Beginning at a stone on the north line of the Sarver Survey of 480,000 acre Morris tract at the point where Guyandotte River crosses said line on the east bank of said River; thence running in a southern direction and following the meanders of Guyandotte River, crossing Buffalo and Huff's Creeks at their mouths, about 5760 poles to where said river crosses the Wyoming line; thence running in a north-easterly direction with said county line about 4800 poles to a stake where said Wyoming line crossing the north line of said survey; thence with the north line of said survey, about 3840 poles to the place of Beginning, containing 20,000 acres, after deducting from said boundary all legal junior grants and school land sales.”

In 1893 (the assessment) year beginning on the first of April), this land was assessed in Triadelphia District, Logan County, as 20,000 acres, in the name of Alvin Irwin and Marie E. Hoyt, in whose deeds the land was described by reference to a “map and survey made by W. T. Sarver under a decree of the Circuit Court of Wyoming County, West Virginia, and filed in the Clerk's Office of said Court.” The land was returned delinquent.

In 1894, the land was assessed as 20,000 acres to Emma I. Pomeroy in Triadelphia District, Logan County, with a reference to the deed above referred to for a description.

The land was returned delinquent under this assessment.

In December 1905, the regular biennial sale of real estate for delinquent taxes, this land was sold for the taxes of 1893, and 1894, under the assessments above, and purchased by the State; and not being redeemed by the claimants within the year allowed for redemption from tax sales, because the absolute property of the State.

Proceedings in the cause of the State of West Virginia vs. Jesse R. Irwin, et al, in which the land in controversy was sold to Stoddard and Hall by the State of West Virginia.

In 1897, May 3, this land, together with other tracts in Logan County purchased by the State, was certified by the Auditor to the Commissioner of School Lands of Logan County as liable to sale for the benefit of the school fund. The Commissioner of School Lands of Logan County, reported the land as thus liable to sale to Circuit Court of Logan County in pursuance of Chapter 105, of the Code, and asked to be allowed to institute suit in the name of the State of West Virginia against the land. This report was recorded in chancery order book of said Court, in which report the land in controversy is described as follows:

“Tract No. 42, containing 20,000 acres, and forfeited in the name of Alvin Irwin and Marie E. Hoyt.”

“Tract No. 43, containing 20,000 acres, and forfeited in the name of Emma I. Pomeroy, and being the same tract forfeited for the year 1893 in the name of Alvin Irwin and Marie E. Hoyt, and described in this report as tract No. 42.”

By an order entered on the 3rd day of May, 1897, in the Circuit Court of Logan County, J. W. Hinchman, Commissioner of School Lands, was directed to institute and prosecute in the Circuit Court of said County, in the name of the State of West Virginia, suits in chancery for the sale of the land described in said report.

1897, June 17th, in pursuance of the above mentioned decree said Commissioner of School Lands instituted a suit styled “State of West Virginia vs. Jesse R. Irwin, et al” for the purpose of selling tracts Nos. 42 and 43, mentioned in the above report, and therein stated to be one and the same tract.

The cause was referred to a Commissioner in chancery in pursuance of section 8, of Chapter 105 of the Code, who published the notice to the plaintiff and defendants and unknown owners required in said section, of the time and place of his sittings. By the decree of reference he was required to report upon each tract of land in the plaintiffs bill mentioned, and its location.

Under this requirement the Commissioner set out at

length in his report the title to this land, as given above, and as to Pomeroy deed says:

In 1893, Jesse R. Irwin Harris Hoyt, Marie Hoyt, Alvin Irwin and Marie Irwin deeded 20,000 acres to Emma Pomeroy. It was returned delinquent for 1893 in the name of Alvin Irwin and Marie Hoyt, in 1894 returned delinquent in the name of Emma Pomeroy."

The Commissioner also reported the amount of taxes due upon this land in a table setting out the name of the owners and the years for which the taxes were delinquent, in which he sets out the name of Emma I. Pomeroy for the year 1894.

The Commissioner was also required to report in whose name the land was forfeited, and under this requirement, reported.

"1894, the whole amount, 20,000 acres in the name of Emma Pomeroy."

1898, April 28th, this report was confirmed, and the land directed to be sold. The land was advertised and sold under this decree, and purchased by Stoddard and Hall, and the sale confirmed by a decree of the Circuit Court of Logan County entered in said cause on the 3rd day of November, 1898.

Stoddard and Hall paid the purchase money in full, and J. B. Wilkinson was appointed Special Commissioner to convey the land sold in said cause according to the decree of sale; and, on the 12th day of November, 1898, said Wilkinson, as such Special Commissioner, executed a deed to Stoddard and Hall.

That after said Purchase of said 20,000 acres of land from the State aforesaid by the Stoddard and Hall, they filed a petition and became parties to the Chancery Cause of the State of West Virginia vs. Henry C. King et al, a suit for the sale of 500,000 acres, as school land, of land patented to Robert Morris on the 23rd day of June, 1795, brought in Wyoming County, and by said petition and answer set out their purchase from the State aforesaid and moved the Court to dismiss said land on the ground that it was neither liable to sale or redemption at the suit of the State.

Pending this proceeding Stoddard and Hall conveyed said land to Henry Patton Trustee, and said Patton, Trus-

tee, conveyed said land to M. B. Mullins, and M. B. Mullins departed this life intestate and leaving Milton A. Mullins his sole heir at law, and the said Milton A. Mullins conveyed said land to U. B. Buskirk, Trustee for himself, J. Cary Alderson, R. L. Shrewsbury and W. R. Lilly.

That on the Amended Petition and Motion of said U. B. Buskirk Trustee on the 11th day of January, 1908, the Circuit Court of Marion County, to which Court the cause of the State of West Virginia vs. Henry C. King, et al, has been regularly transferred and removed, entered a decree adjudicating that all the land described in the deed dated June 8th, 1907, from W. K. Cowden, Trustee et al, to the Buffalo Coal and Coke Company, together with other land described in said decree was not forfeited to the State and not therefore liable to sale at the suit of the State or subject to redemption by Henry C. King but owned in fee simple by the petitioners, U. B. Buskirk, Trustee for himself, J. Cary Alderson, R. L. Shrewsbury and W. R. Lilly, to which cause and adjudication the State of West Virginia, Henry C. King, these petitioners and their predecessors in title were parties.

That on July 14, 1908, Henry C. King obtained an appeal from said decree from the Supreme Court of Appeals of West Virginia. That said Supreme Court of Appeals heard said appeal and on the 15th day of December, 1908, entered a decree modifying the decree entered upon the 11th day of January, 1908, by excluding from said decree the parts of land tracts No. 1 and No. 2 on the north side of the Sarver line of the 480,000 acres from the point where said lines crosses the Logan and Wyoming County lines as run upon the ground by C. S. Stone whose deposition was filed in the cause.

That tract No. described in said decree is the same tract No. 1 in the deed from Cowden Trustee, et al, to the Buffalo Coal and Coke Company and that No. in said deed last mentioned, and the portion of tract No. 1 on the north side of said line is the land described above as being owned by the Altizer Coal Land Company and not within the Pomeroy 20,000 acres and the land above described as being owned by the Buffalo Coal and Coke Company outside of the Pomeroy 20,000 acres in the lands on the north side of said line embraced in tract No. 2 in said decree.

That the Supreme Court of Appeals upon the final hearing of said cause of the State of West Virginia vs. Henry C. King et al, affirmed the decree of January the 11th, 1908, dismissing the land as aforesaid, by a final decree entered in said cause the 22nd day of December, 1908, a duly certified copy of the record in the cause of the State of West Virginia vs. Henry C. King, et al from the Supreme Court so far as it relates to the land dismissed by the decree of January 11th, 1908, is herewith filed as a part of this petition and answer in two printed volumes, marked on the front cover with the number of the cause, name of the Court style of the suit, date of the appeal and Court from which appealed and name of Judges on the back cover, marked Exhibit Buskirk Deed.

The petitioners as successors in title to said U. B. Buskirk, Trustee here pleads said adjudication made by the decree of January the 11th, 1908, and affirmed by the Supreme Court as aforesaid as an estoppel against the further prosecution of this suit against the land dismissed by said decree and described therein, and here move the Court to dismiss the land embraced in said decree of January the 11th, 1908, from this suit on the ground of said adjudication, as well as upon the further ground that said land as shown by said record has been sold as School Land and the taxes paid thereon since said sale and the sale so made validated by the Act of the Legislature of West Virginia, passed at the regular Session of 1905.

Petition to Redeem.

The petitioners further say that they are the successors in title to the parties in whose name the said DeWitt Clinton grant made by the Commonwealth of Virginia to DeWitt Clinton for 142,000 acres forfeited to the State of West Virginia for failure to enter the same taxation for five successive years after the year 1869, as found by the report of J. Cary Alderson Commissioner in Chancery to whom this cause was referred and who filed his report in this cause on the 19th day of June, 1894, in which he reported said DeWitt Clinton grant forfeited to the State of West Virginia for said failure to enter the same for taxation for five years after the year 1869, and which report as

to said forfeiture was duly confirmed by a decree entered in this cause.

That said petitioners derived title to said land by the following grants, deeds, wills indentures and adjudications to-wit:

DeWitt Clinton Grant for 142,000 Acres.

1st. That pursuant to entries theretofore made by Austin Nichols Gordon Lloyd, County Surveyor of *Montgomery* County, Virginia, did, on the 10th day of June, 1795, complete a survey of 142,000 acres of land, for said Nichols situate on Buffalo and Huff's Creeks and Guyandotte and Coal Rivers, then in Montgomery and Wythe Counties, Virginia, the greater part thereof in said Montgomery County, but now in Logan, Wyoming, Boone and Raleigh Counties, West Virginia.

2nd. Before the issuing of the grant for said land, Austin Nichols assigned the same to David Booth, who assigned the same to DeWitt Clinton, and on the 19th day of February, 1796, Robert Brooks, then Governor of the State of Virginia, issued a grant for said 142,000 acres of land to said DeWitt Clinton.

3rd. DeWitt Clinton, soon after the issuing of said patent, proceeded to dispose of said lands, and a number of conveyances of portions of the same were made with the result that in 1838 the title to the whole thereof was vested in *Oliver* Phelps 3rd conveyed to him in undivided portions, one-half as follows:

DeWitt Clinton to Richard and Austin Nichols, to Jabez Bacon to Daniel Bacon, to Nathaniel Bacon, to Nathan Preston, Sr., to Nathan Preston, Jr., to Oliver Phelps, 3rd.

The other half thus: DeWitt Clinton to Oliver Phelps 1st., by descent to Oliver L. Phelps and Mary Jackson; the Oliver L. Phelps part then by will to Seymour and Smedley, Trustees, to Gideon Granger, to Oliver L. Phelps, 3rd.

The Jackson one-fourth to Andrew Kingsbury, Treasurer to Gideon Granger, to Oliver Phelps, 3rd.

The above named Oliver L. Phelps died intestate on the 22nd day of February, 1809, leaving said Oliver L. Phelps

and Mary Jackson, wife of Amaza Jackson, his sole heirs-at-law: The conveyances referred to above are as follows:

4th. DeWitt Clinton, by deed dated June 29th, 1796, conveyed to Richard Nichols and Austin Nichols, a moiety of said 142,000 acres of land.

This deed was recorded Wythe County, Virginia, on the 15th day of November 1799, in Montgomery County, Virginia, at February Court, 1799, and in Logan County, West Virginia in Deed Book "C" pages 411 and 412.

5th. Richard and Austin Nichols, by deed dated July 1st 1796, conveyed said moiety of land to Jabez Bacon. This deed was recorded in said Wythe County, November, 13th, 1799, in said Montgomery County, at February Court, 1799, and in said Logan County, West Virginia, in Deed Book "C" page 413.

6th. By deed dated March 5th, 1805, recorded in said Logan County, in Deed Book "C" page 402, said Jabez Bacon conveyed said moiety of land to his son, Daniel Bacon.

7th. By deed dated March 19th, 1805, recorded in said Logan County, in Deed Book "C", page 412, said Daniel Bacon conveyed said moiety of land to Nathaniel Bacon.

8th. By deed dated September 15th, 1812, recorded in said Logan County in Deed Book "C", page 408, said Nathaniel Bacon conveyed said moiety of land to Nathan Preston, Sr.

9th. By deed dated May 13th, 1817, recorded in said Logan County, in Deed Book "C", page 410, said Nathan Preston, Sr., conveyed said moiety of land to Nathan Preston, Jr.

10th. By deed dated December 7th, 1837, recorded in said Logan County in Deed Book "C" page 405, said Nathan Preston, Jr., conveyed said moiety of land to Oliver Phelps (Grandson of Oliver Phelps, the grantee in deed next following).

11th. By deed of mortgage, dated March 8th, 1796, recorded in Fayette County, West Virginia, in Deed Book "A", page 407, and in Raleigh County, West Virginia, in Deed Book "A", page 194, said DeWitt Clinton and wife conveyed the other moiety of said land to Oliver Phelps (grandfather of Oliver Phelps the grantee in deed first above), to secure the payment of a large amount of money.

12th. By deed dated April 8th, 1801, recorded in said Fayette County, in Deed Book "A" page 407, and in said *Raliegh* County in Deed Book "A" page 194, said DeWitt Clinton released and conveyed to said Oliver Phelps, the grantee in deed next above, said DeWitt Clinton's equity of redemption in said land.

13th. Oliver Phelps, Sr., named as grantee in exhibits died intestate, on February 22nd, 1809, leaving Oliver L. Phelps and Mary Jackson, wife of Amasa Jackson, his only surviving heirs: Oliver L. Phelps in the year 1813, leaving a will dated March 2nd, 1813 in which he devised all his real estate to Zachary Seymour and James Smedley, in trust, with power to sell and convey the same. This will was duly probated and recorded in Ontario County, New York, October 9th, 1813, and in *Raliegh* County, West Virginia, February 8th, 1861, Will Book 1, page 18.

14th. By deed dated September 26th, 1821, recorded in said *Raliegh* County in Deed Book "A" page riah Seymour and James Smedley, Trustees under the will of said Oliver L. Phelps, conveyed to Gideon Granger the said Oliver L. Phelps, one-fourth of said land.

15th. By deed dated June 27th, 1817, recorded in Ontario County, N. Y., in Deed Book "28", page 435, and in said *Roliegh* County in Deed Book "A" page Amasa Jackson and Mary Jackson, his wife, (the daughter of Oliver Phelps and sister of Oliver L. Phelps) conveyed to Andrew Kingsbury, Treasurer of the State of Connecticut, their one-fourth interest in said land.

16th. By deed dated May 12th, 1818, recorded in said *Raliegh* County in Deed Book "A", page 206, said Andrew Kingsbury, Treasurer, conveyed said one-fourth interest in said land to Gideon Granger.

17th. By his last will and testament, dated January 5th, 1822, and duly probated and recorded in said *Raliegh* County in Will Book No. 1, page 6, said Gideon Granger devised his interest in said land to Mindwell P. Granger (his wife) and Francis Granger (his son), and appointed them executors of his said will, with power to sell and convey his real estate.

18th. By deed dated January 6th, 1838, recorded in said Logan County, in Deed Book "C", page 406, said Mindwell P. Granger and Francis Granger, Executors and

devises of Francis Granger, conveyed said one-fourth interest in said land to Oliver Phelps (3rd) thus vesting in him the title to all of said 142,000 acres survey.

19th. Said Oliver Phelps now owning said 142,000 acres of land, by deed dated January 9th, 1838, his wife, joining therein, conveyed the whole thereof to Horace G. Johnson and Hiram Johnson, which deed is recorded in said Logan County, in Deed Book "C" page 403.

20th. By deed dated January 24th, 1838, recorded in said Logan County, in Deed Book "C" page 409, said Horace G. Johnson and Hiram Johnson and wife, conveyed said 142,000 acres of land to Samuel Benedict, Jr., and Chipman P. Turner, as tenants in common, in the proportions of two-thirds thereof to said Benedict and one-third thereof to said Turner.

21st. By deed dated July 23rd, 1839, recorded in said Logan County, in Deed Book "C", page 401, said Shipman Turner and wife conveyed their one-third interest in said land to Burr Wakeman.

22nd. By deed dated October 6th, 1856, recorded in said Logan County, in Deed Book "C", page 508, said Samuel Benedict and wife, conveyed to John S. Cunningham and Helen M. Cunningham, his wife, an undivided one-fourth of said 142,000 acres of land.

23rd. By deed dated October 1st, 1858, recorded in Boone County, Deed Book "B", page 605, in *Raliegh* County, Deed Book "B" page 88, and in Wyoming County in Deed Book "B" page 149, Samuel Benedict and wife and John S. Cunningham and wife, conveyed to Burr Wakeman, the southeasterly part of said 142,000 acres of land, to-wit: that part lying south and southeasterly of a line drawn from a point formed by the intersection of Big Elk Run and Big Coal River, thence a straight line in a southeasterly direction to a point in said tract where Huff's Creek intersects Guyandotte River, this and the following deed partitioning said tract between said Burr Wakeman and said Benedict and Cunningham, the latter's interests being laid off together.

24th. By deed dated October 1st, 1858, recorded in said Boone County, in Deed Book "B" page 491, Burr Wakeman and wife conveyed to said John S. Cunningham, and Helen M. Cunningham, his wife, and Samuel Benedict, all

of said 142,000 acres of land lying on the northerly and north-westerly side of said line drawn from the mouth of Big Elk Run to the mouth of Huff's Creek.

25th. By deed dated December 15th, 1864, recorded in said Boone County, in Deed Book "D" page 463, Samuel Benedict and wife and John S. Cunningham and wife conveyed to said Burr Wakeman 60,000 acres out of the land assigned to said Benedict and Cunningham by the deed marked "Buffalo Ex. 23", which said 60,000 acres was laid off by metes and bounds in the most northerly part of said Benedict and Cunningham lands, which said 60,000 acres, are now owned by sundry parties not parties to this proceeding, and whose titles thereto are good and valid, and no part of which 60,000 acres is involved in this proceeding.

26th. This deed, in consideration of \$24,000.00 conveyed to said Burr Wakeman 60,000 acres of land, exclusive of 3,400 acres, the amount estimated to be held by Junior patents and the interlock with the Rutter & Etting Survey. The number and acreage of said junior patents, however, for exceeded this estimate, and fully one-half of said 60,000 acres was covered by the said Rutter & Etting survey, a superior title, with the result that Burr Wakeman did not get over 22,000 acres of land by this deed.

27th. Respondents further say and charge that prior to the year 1891, said Samuel Benedict departed this life intestate, leaving said Helen M. Cunningham (his sister) and as his sole heirs-at-law, and that as such heir-at-law said Helen M. Cunningham inherited one-half of whatever interest, if any, said Samuel Benedict then owned in said land.

Respondent further says that on the 16th day of October, 1891, said John S. Cunningham being the owner of whatever interest in said land was conveyed to him by Samuel Benedict, by said deed of October 6th, 1856, and said Helen M. Cunningham being the owner of whatever interest in said land was conveyed to her by said Benedict by said last named deed, and in addition thereto, being the owner of one-half of whatever interest remained in said Benedict, by descent as aforesaid, said Cunningham and wife, by deed dated October 16th. 1891, conveyed to J. W. Malcolm, T. C. Hall, G. O. Chilton and M. B. Mullins, their

interests in said land. The consideration for the execution of said deed was that the second parties should endeavor to redeem said land from forfeiture for the non-payment of taxes thereon, and when redeemed the second parties should re-convey to the first parties one-fifth of any of said lands belonging to the first parties and redeemed by the second parties.

28th. By deed dated January 27th, 1892, said J. W. Malcolm, G. O. Chilton, T. C. Hall and M. B. Mullins, conveyed to John A. Sheppard, Trustee, with full power to sell and convey the same, two-thirds of the four-fifths interest or (8/15) owned by them and conveyed by the deed last aforesaid, which interest so acquired by said Sheppard, Trustee, was conveyed by him to Alexander McClintock on June 29th, 1893, by deed duly recorded in said Logan County, in Deed Book "Q" page 559.

29th. By deed dated, 1892, said J. W. Malcolm conveyed his interest in said land to John B. Floyd, and by deed dated May 3rd, 1898, recorded in said Logan County, in Deed Book "R", page 83, said John B. Floyd and wife, conveyed said interest to Alexander McClintock, and by deed dated June 7th, 1893, said T. C. Hall, G. O. Chilton and M. B. Mullins conveyed to said Alexander McClintock all their interests in said lands.

30th. Said Burr Wakeman died prior to the year 1888, leaving a last will and testament, dated October 22nd, 1875, duly probated in the City of New York, where he lived, and in said Boone County, wherein he appointed Louise W. Knox, afterwards Tiffany and R. W. De Forest his executors and trustees, with power to sell and convey his real estate.

31st. By deed dated February 28th, 1891, said De Forest and Tiffany, Executors and Trustees under the will of Burr Wakeman, conveyed all his interest in said 142,000 acres DeWitt Clinton survey, to B. C. Bowman, which deed is recorded in said Logan county, in Deed Book "P", page 434.

32nd. By deed dated September 1st, 1891, recorded in said Logan County in deed Book "P" page 616, said B. C. Bowman and wife and the Bowman Lumber Company, conveyed to said Alexander McClintock said Burr Wakeman's interest in said 142,000 acres of land (with

other lands). The timber reserved in said deed was afterwards conveyed by said Bowman to said McClintock, by deed dated on the 15th day of August, 1893, recorded in said Logan County Clerk's Office in Deed Book R, page 546.

Further answering respondent says that this suit was brought to July Rules 1893, and afterwards to-wit, on the 25th day of April, 1894, said Alexander McClintock filed his petition in said cause asserting his ownership to said DeWitt Clinton land, to which said petition reference is here made, and filing the said petition, duly certified copies of said entries, survey, patents, deeds, will hereinbefore referred to, as exhibits with said petition, and said exhibits are hereby made a part of this answer, and prayed to be read herewith; and should any of said papers be missing from the *filed*, the respondents hereby ask leave to file copies of the same, should they be hereafter required in the progress of this proceeding, and when so required that they may be so considered as a part of this said answer.

Respondents further says and charge that on the 19th day of September, 1893, said Alexander McClintock and his son, John McClintock, partners as Alexander McClintock and Son, filed their bill in the United States Court, at Parkersburg, West Virginia, against Fontaine Bros. and others, praying the appointment of a receiver of all their property &c., and on said date Z. T. Vinson was appointed temporary receiver, and made permanent receiver on the 29th day of September, 1893, a duly certified copy of which latter decree is here filed marked "Buffalo Ex. No. 1."

In the course of said proceedings one C. L. Talbott, made a proposition for the purchase of all the real estate of said McClintock, which proposition was accepted and confirmed by the Court, and deed duly executed to said Talbott by said McClintocks and wives, and by said Vinson, dated May 9th., 1898, recorded in said Boone County, in Deed Book "R", page 408, and in said Logan County in Deed Book "T" page 66, a duly certified copy of which deed is here filed marked "Buffalo Ex. No. 2".

By deed dated on the 9th day of May, 1898, said C. L. Talbott and wife conveyed to D. F. Frazee, Trustee, with full power to sell and convey the same, said DeWitt Clinton

lands, which deed is recorded in said Logan County, in Deed Book "T" page 73, and in said Boone County in Deed Book "R" page 437, a duly certified copy of which is here filed as part hereof marked "Exhibit No. 3".

By deed dated on the 20th day of February, 1902, said D. F. Frazee, Trustee, conveyed to W. K. Cowden, Trustee, with full power to sell and convey the same, all of said land situate in Logan County and Wyoming Counties, West Virginia, extending from the Guyandotte River to the top of the ridge dividing the waters of the Guyandotte River and Coal River, a duly certified copy of which is herewith filed as part hereof, marked "Exhibit Buffalo Deed No. 4".

By deed dated on the 12th day of January, 1907, said D. E. Frazee, Trustee, conveyed the residue of said DeWit Clinton lands to the respondent, the Buffalo Coal and Coke Company, a duly certified copy of which is herewith filed as part hereof, marked "Exhibit Buffalo Deed No. 5".

By deed dated the 20th day of January, 1906, Helen M. Cunningham and the other heirs at law of Samuel Benedict deceased, referred to in Paragraph 27 of this petition and answer, conveyed whatever interest they had in said land to E. E. England, and R. L. Joyce, a duly certified copy of which deed is herewith filed as part hereof, marked "Buffalo Exhibit No. 6".

By deed dated on the day of said E. T. England and wife R. L. Joyce and wife and the heirs of said S. S. Altizer, the said S. S. Altizer being then deceased, conveyed all the said Benedict's and Cunningham's interest in said land to the Altizer Coal Land Company, a corporation, a duly certified copy of which deed is herewith filed as part hereof, marked "Buffalo Exhibit No. 7".

By deed dated on the 17th day of September, 1908, said Altizer Coal Land Company conveyed to the respondent, the Buffalo Coal and Coke Company, all their interest, right and title in said land, lying on the south side of Buffalo Creek, that is in the right hand side of said creek, going up the creek, and containing in the aggregate 8481.73 acres of land, a duly certified copy of which deed is herewith filed as part hereof, marked "Buffalo Exhibit No. 8".

That on the 8th day of June 1907, the said W. K. Cowden, Trustee, together with his cestui que trust, J.

L. Caldwell and wife, W. L. Ashby and wife, E. T. Crawford and wife, G. S. Porter and wife, Fred Gardner and wife, Maud J. McClintock and husband, Mrs. T. J. Prichard (widow) and U. B. Buskirk, Trustee, U. B. Buskirk and wife, J. Cary Alderson and wife, R. L. Shrewsbury and wife and W. R. Lilly and wife conveyed the portion of said land therein described to the Buffalo Coal and Coke Company, a duly certified copy of said deed is herewith filed as part hereof, marked "Buffalo Ex. No. 9".

By deed dated on the day of the respondent, the Buffalo Coal and Coke Company conveyed to the said Altizer Coal Land Company, all of said land lying on the north left hand side of Buffalo Creek, going up the creek, containing acres, as will fully appear from a duly certified copy of said deed herewith filed as part hereof, marked "Buffalo Ex. No. 10".

Petitioners deny that no one has the right to redeem the DeWitt Clinton survey and deny that it forfeited to the commonwealth of Virginia before the formation of the State of West Virginia and further deny that the decree entered on the 30th day of September, 1887, in the cause of the State of West Virginia vs. Henry C. King, et al fixed and adjudicated the boundary and extent of the grant of the Robert Morris 500,000 acres claimed by Henry C. King, and deny that these petitioners are bound by said adjudication, even if said decree had fixed said boundaries as claimed by said King (which petitioners deny) on account of the following facts and subsequent adjudication, to-wit:

On the 29th day of October, 1897, Z. T. Vinson, Receiver as aforesaid of Alexander McClintock who had filed a petition in the cause of the State of West Virginia against Henry C. King brought a suit in equity in the Circuit Court for the Southern District of West Virginia against Henry C. King and J. R. Robertson, Commissioner of School Lands of Wyoming County praying to set aside the said decree of September the 30th, 1897, on the ground that said decree so far as it affected said McClintock's rights in and to the 142,000 acre DeWitt Clinton grant was null and void for having been procured by fraud and *deceit* and in violation of the written stipulations entered into between Counsel for McClintock and King by which it was agreed that said cause should be continued at the term

of Court at which the decree of September 30th 1897 was entered and upon which agreement to continue said cause said McClintock and Counsel fully relied and was not present at the term of the Court at which said decree was entered and by the fraudulent violation of said agreement by the said Henry C. King and his counsel, said McClintock was prevented from proving his defense to the contention of Henry C. King that the 500,000 acres was located as described in said decree and that D. F. Frazee, Trustee, successor in title of said Z. T. Vinson receiver, filed an amended and supplemental bill in said cause to which Henry C. King and J. R. Robertson, Commissioner of School Lands appeared and filed a demurrer.

That on the 20th day of December, 1902, a decree was entered in said cause by the consent of the plaintiff and the defendant, Henry C. King, by which it was adjudicated that said D. F. Frazee, Trustee successor in title to the said Z. T. Vinson receiver and Alexander McClintock were not bound or estopped in any way for asserting any claim they held to the said *DeWit* Clinton grant of 142,000 acres by reason of the decree of September 30th, 1897, a duly certified copy of the record in said last mentioned cause is herewith filed as a part hereof marked "Vinson Receiver Record".

Petitioners further say that on the 5th day of December, 1906, in the cause of the State of West Virginia vs. Henry C. King et al, it was adjudicated by the Circuit Court of Marion County to which Court the last mentioned cause had been regularly transferred and was then pending that the correct boundary of the Robert Morris 500,000 acre grant, now claimed by said King, was properly located and described as set out in the decree entered in said cause on said date and the lines thereof so far as the interlock with the said *Dewit* Clinton grant of 142,000 acres shown upon the map filed as Exhibit Buffalo Land Map" and are the lines thereon shown as *extending* as follows, From "ZZ" to "MO" and from "MO" to "MM" and do not include any of the land sought to be redeemed by the petitioners in this cause.

That on appeal from said decree of December the 6th,

1906, taken by Henry C. King to the Supreme Court of Appeals of West Virginia, the last mentioned Court by its decree entered in said cause on the 22nd day of December 1908, confirmed the decree of the Circuit Court of Marion County, entered on the 6th day of December, 1906, and that the same is now a binding adjudication estopping any further inquiry as to the proper location of the said Robert Morris grant of 500,000 acres, that Henry C. King and these Petitioners successors in title and the State of West Virginia were parties to both the decree of December the 5th, 1906 and the confirmation thereof by the Supreme Court as aforesaid, a duly certified copy of said decrees of Dec. 6th, 1906, and Dec. 22nd, 1908 are herewith filed as part of this petition, marked "Exhibit King Boundary".

Petitioners further deny each and every allegation contained in the plaintiffs bill of complaint filed herein and in the amended bill of complaint filed herein which are in any way inconsistent with the foregoing petition and answer or the right claimed herein and further deny each and every allegation of the petition and answer of Henry C. King filed herein and in the amended answer filed by Henry C. King herein which are inconsistent with the right claimed by the petitioners in this petition and answer or which claim any right as against these petitioners to any of the land described herein.

Petitioners therefore pray that a decree may be entered herein dismissing all the land inside the said Pomeroy 20,000 acre tract of land, and that they may be allowed to redeem the land outside of said Pomeroy tract described in this their petition and answer, or be allowed the excess of the purchase money after paying costs of suit and expense of sale in the event of a sale of said lands, and for such other further and general relief as the Court may see fit to grant, and in duty bound they will ever pray.

In Witness whereof and in verification of the allegations set out in this Petition and Answer the said Buffalo Coal & Coke Company and the Altizer Coal Land Company, have caused their respective names and official seals to be affixed

to this petition and answer by J. L. Caldwell and E. T. England, their respective Presidents.

BUFFALO COAL & COKE COMPANY.

By J. L. CALDWELL, *President*.

ALTIZER COAL LAND COMPANY.

By E. T. ENGLAND, *President*.

E. T. ENGLAND,

LILLY & SHREWSBURY,

Sols.

EXHIBIT NO. 22.

A Copy.

State of West Virginia,

vs.) In Chancery.

Alexander McClintock, et al.

Report of Commissioner in Chancery.

To the Honorable John B. Wilkinson, Judge of the Circuit Court of Logan County, West Virginia:

Your undersigned commissioner in Chancery to whom this cause was referred, begs leave to report as follows:

That under the requirements of the decree of the Circuit Court of Logan County, entered on the 30th day of July, 1907, by which the above entitled cause was referred to your commissioner, your commissioner gave the notice required by said decree by causing to be published and posted as required by Section 8 of Chapter 105 of the Code of West Virginia, a copy of said *decree* and the notice therein required, which will more fully appear from a copy of said notice and the returns thereon showing the posting and publishing thereof, herewith filed as "Commissioner's Exhibit "Notice."

That after the posting and publishing of said notice on the 10th day of September, 1907, the time specified in said notice for the beginning of the taking of the report, your commissioner, at the law office of Chafin & Bland, in the County of Logan and State of West Virginia, begun the discharge of his duties under said decree, and no party in interest appearing before your said commissioner the fur-

ther making of this report was continued until the 7th day of October, 1907, at the same place.

ROBERT BLAND,
Commissioner.

Office of Chafin & Bland, Logan, W. Va., October 7th. No party appearing the further making of this report is continued until November 4th, 1907.

ROBERT BLAND,
Commissioner.

Office of Chafin & Bland, Logan W. Va. November 4th, 1907. No party appearing the further making of this report is continued until the 2nd day of December, 1907.

ROBERT BLAND,
Commissioner.

Office of Chafin & Bland, Logan W. Va. December 2nd, 1907. No party appearing the further making of this report is continued until December 2nd, 1907.

ROBERT BLAND,
Commissioner.

Office of Chafin & Bland, Logan, W. Va. December 2nd, 1907. No party appearing the further making of this report is continued until January 6th, 1908.

ROBERT BLAND,
Commissioner.

Office of Chafin & Bland, Logan, W. Va. January 6th, 1908. No party appearing the further making of this report is continued until February 3rd, 1908.

ROBERT BLAND,
Commissioner.

Office of Chafin & Bland, Logan, W. Va. February 3rd, 1908. No party appearing the further making of this report is continued until March 2nd, 1908.

ROBERT BLAND,
Commissioner.

Office of Chafin & Bland, Logan, W. Va. March 2nd, 1908.
No party appearing the further making of this report is continued until April 6th, 1908.

ROBERT BLAND,
Commissioner.

Office of Chafin & Bland, Logan, W. Va., April 6th, 1908. No party appearing the further making of this report is continued until May 4th, 1908.

ROBERT BLAND,
Commissioner.

Office of Chafin & Bland, Logan, W. Va. May 4th, 1908. No party appearing the further making of this report is continued until June 1st, 1908.

ROBERT BLAND,
Commissioner.

Office of Chafin & Bland, Logan, W. Va., June 1st, 1908. No party appearing the further making of this report is continued until July 6th, 1908.

ROBERT BLAND,
Commissioner.

Office of Chafin & Bland, Logan, W. Va. July 6th, 1908. No party appearing the further making of this report is continued until August 3rd, 1908.

ROBERT BLAND,
Commissioner.

Office of Chafin & Bland, Logan, W. Va. August 3rd, 1908. No party appearing the further taking of this report is continued until September 7th, 1908.

ROBERT BLAND,
Commissioner.

Office of Chafin & Bland, Logan, W. Va. September 7th, 1908. No party appearing the further taking of this report is continued until October 5th, 1908.

ROBERT BLAND,
Commissioner.

Office of Chafin & Bland, Logan W. Va. October 5th, 1908.
No party appearing the further making of this report is continued until November 2nd, 1908.

ROBERT BLAND,
Commissioner.

Office of Chafin & Bland, Logan, W. Va., November 2nd, 1908. No party appearing the further making of this report is continued until December 7th, 1908.

ROBERT BLAND,
Commissioner.

Office of Chafin & Bland, Logan W. Va. January 4th, 1909. No party appearing the further making of this report is continued until February 1st, 1909.

ROBERT BLAND,
Commissioner.

Office of Chafin & Bland, Logan, W. Va., February 1st, 1909. No party appearing the further making of this report is continued until March 1st, 1909.

ROBERT BLAND,
Commissioner.

Office of Chafin & Bland, Logan, W. Va. March 1st, 1909. No party appearing the further making of this report is continued until April 5th, 1909.

ROBERT BLAND,
Commissioner.

Office of Chafin & Bland, Logan, W. Va April 5th, 1909. No party appearing the further making of this report is continued until May 3rd, 1909.

ROBERT BLAND,
Commissioner.

Office of Chafin & Bland, Logan, W. Va. May 3rd, 1909. No party appearing the further making of this report is continued until June 7th, 1909.

ROBERT BLAND,
Commissioner.

Office of Chafin & Bland, Logan, W. Va. June 7th, 1909.

No party appearing the further making of this report is continued until July 5th, 1909.

ROBERT BLAND,
Commissioner.

Office of Chafin & Bland, Logan, W. Va. July 5th, 1909.
No party appearing the further making of this report is continued until August 2nd, 1909.

ROBERT BLAND,
Commissioner.

Office of Chafin & Bland, Logan, W. Va. August 2nd, 1909.
No party appearing the further making of this report is continued until September 6th, 1909.

ROBERT BLAND,
Commissioner.

Office of Chafin & Bland, Logan, W. Va., September 6th, 1909. No party appearing further making of this report is continued until October 4th, 1909.

ROBERT BLAND,
Commissioner.

Office of Chafin & Bland, Logan, W. Va. October 4th, 1909.
No party appearing the further making of this report is continued until November 1st, 1909.

ROBERT BLAND,
Commissioner.

Office of Chafin & Bland, Logan, W. Va. November 1st, 1909. No party appearing the further making of this report is continued until December 6th, 1909.

ROBERT BLAND,
Commissioner.

Office of Chafin & Bland, Logan, W. Va., December 6th, 1909. No party appearing the further making of this report is continued until January 3rd, 1910.

ROBERT BLAND,
Commissioner.

Office of Chafin & Bland, Logan, W. Va., January 3rd,

1910. No party appearing the further making of this report is continued until January 17th, 1910.

ROBERT BLAND,
Commissioner.

Office of Chafin & Bland, Logan, W. Va. January 17th, 1910. No party appearing the further making of this report is continued until February 7th, 1910.

ROBERT BLAND,
Commissioner.

Office of Chafin & Bland, Logan, W. Va. February 7th, 1910. This day your commissioner began the making of the report required of him by the decree entered in this cause, and continued from day to day the making thereof the same is completed.

ROBERT BLAND,
Commissioner.

On the 15th day of February 1910, the Buffalo Coal & Coke Company and the Altizer Coal Land Company, filed their petition and answer before your commissioner, together with the following exhibits: "Buffalo Exhibit No. 1" "Buffalo Exhibit No. 5"; Buffalo Exhibit No. 6"; Buffalo Exhibit No. 7"; Buffalo Exhibit No. 8"; Buffalo Exhibit No. 9"; Buffalo Exhibit No. 10"; and Exhibit "Vinson Receiver Record," and Exhibit Buskirk Decree in two printed volumes, certified by the Clerk of the Supreme Court of West Virginia," and Exhibit "Buffalo Land Map"

On the 15th day of February, 1910, your Commissioner took deposition of C. J. Pearson and W. I. Campbell.

That from the pleadings, decrees, petitions and papers filed in this cause, and the depositions taken herein, including the petition of the Buffalo Coal & Coke Company and the Altizer Coal Land Company, and the exhibits therewith filed and the deposition of C. J. Pearson and W. I. Campbell, upon all of which your commissioner heard this cause, your commissioner finds and reports as follows:

1st requirement: "Said commissioner shall ascertain and report whether or not the grant of 142,000 acres made by the State of Virginia to DeWitt Clinton and described in the pleadings in this cause is forfeited to the State, and if so, when it became so forfeited to this State, and if so,

when it became so forfeited to this State of the State of Virginia."

Under this requirement your commissioner would report that there has been no evidence introduced before your commissioner as to whether or not said grant is forfeited, but your commissioner finds that on the 10th day of May, 1894, J. Cary Alderson made a report in this cause under a decree of reference referring the cause to him in which he reported that the tract of 142,000 acres granted to DeWitt Clinton as aforesaid was forfeited to the State of West Virginia, for failure to enter the same for taxation for five successive years after the year 1869, and that said report as to the finding or forfeiture was confirmed by a decree entered in this cause, which as your commissioner believes is binding upon him, and he therefore reports that said grant of 124,000 acres was forfeited to the State of West Virginia for *not* being entered for taxation for five successive years after the year 1869.

2nd requirement: "He shall ascertain and report how much and what parts of said grant of 142,000 acres is now liable to sale for the benefit of the School Fund of West Virginia, and if a less quantity than the whole is liable to sale he shall report an accurate description, showing the location by metes and bounds of the part or parts so liable."

Under this requirement your commissioner finds that the following parts of the DeWitt Clinton grant of 142,000 acres is liable to sale for the benefit of the School Fund, which includes a portion of the 22 descriptions filed with the plaintiff's bill, and which is described as follows, to-wit: Buffalo Coal & Coke Company, Parcel No. 1, described in the petition of the Buffalo Coal & Coke Company Parcel No. 2, described in said last mentioned petition; Buffalo Coal & Coke Parcel No. 3, described in said last mentioned petition; Altizer Coal Land Company, Parcel No. 1, described in said last mentioned petition Altizer Coal Land Company Parcel No. 2, described in said last mentioned petition; Altizer Coal Land Company, Parcel No. 3, described as aforesaid.

Said parcels contain the following number of acres in the order in which they are above named, to-wit: 998.4; 10.8; 257.5; 671.6; 1,057.93; 444.04; and said parcels are definite-

ly described by metes and bounds in the petition aforesaid, and the descriptions are signed by C. J. Pearson, surveyor, and your commissioner refers to said petition for a description of the land liable to sale as aforesaid.

3rd requirement: "He shall report the amount of taxes, interests, costs and damages and the several funds to which they respectively belong, properly chargeable against the land found by him to be liable to sale for the benefit of the *School Fund*."

Under this requirement your commissioner finds that the amount of taxes and interest thereon at 12 per cent annum chargeable against the land described in the last preceding paragraph, is as follows, to-wit: On Parcels, Buffalo Coal & Coke Company, No. 1, containing 998.4 acres, and No. 2 containing 10.8 acres, both aggregating 1,009.2 acres, for the various *purposed* as follows:

State purposes	\$ 365.63
State School purposes	147.55
County Levy	1206.38
District of Triadelphia, Teachers' Fund...	783.36
District of Triadelphia, Building Fund..	415.48
District of Triadelphia, for roads.....	194.25
Special County Levy	90.26

Total\$3202.91

On parcel, Buffalo Coal & Coke Company, No. 3 containing 957.5 acres, for the various purposes, are as follows:

State purposes	\$ 93.29
State School purposes	27.00
County Levy	300.91
District of Triadelphia, Teachers' Fund..	107.88
District of Triadelphia, Building Fund..	115.91
District of Triadelphia, for roads.....	49.00
Special County Levy	22.33

Total\$ 816.33

On parcels Altizer Coal Land Company, No. 1, containing 671.6 acres, Altizer Coal Land Company, parcel No. 2, containing, 1,057.93 acres, Altizer Coal Land Com-

pany, parcel No. 3, containing 444.04 acres, aggregating 2,175.57 acres for the various purposes are as follows:

State purposes	\$ 787.48
State School purposes	317.79
County Levy	2599.26
District of Triadelphia, Teachers' Fund.	1687.17
District of Triadelphia, Building Fund..	895.46
District of Triadelphia, for roads	418.37
Special County Levy	194.40
Total	<u>\$6899.93</u>

That the above calculation of taxes and interest is made upon the valuation of this land on the basis testified to by W. I. Campbell in his deposition given in this cause, and the levies were taken from the County Clerk's records of Logan County, which your commissioner examined.

That the above finding of taxes is made and include all of the taxes from 1863 to and including 1909, and is also made without regard to the payments that have been made upon said taxes by the sales of timber, which sales and amount of timber are reported under the sixth requirement in the decree of reference entered in this cause.

4th requirement: "He shall report what portion, if any, of the DeWitt Clinton Survey is held by persons whose titles are protected by Article No. 3, Section 13, of the Constitution of West Virginia."

5th requirement: "He shall report whether or not any portion of the DeWitt Clinton Survey has been sold in proper proceedings by the Commissioner of School lands in Logan County."

Under these two requirements your commissioner would report that all the land embraced in the 22 descriptions filed with the plaintiff's bill in this case was sold by the commissioner of School Lands of Logan County, and purchased by Stoddard and Hall and the sale thereof confirmed to them on the 3rd day of November, 1898, and is held by the Buffalo Coal & Coke Company and the Altizer Coal Land Company under and are protected by Article 3, Section 13, of the Constitution of West Virginia, except the portion upon which taxes have been calculated as aforesaid, and which is described in their answer as "Buffalo Coal and

Coke Company, Parcel No. 1, containing 998.4 acres, parcel No. 2, containing 10.8 acres, parcel No. 3, containing 671.6 acres, parcel No. 2, containing 1,057.93 acres and parcel No. 3, containing 444.04 acres. The said lands so sold and protected by the Constitution being described in a deed dated June 8th, 1907, from W. K. Cowden, Trustee, to the Buffalo Coal & Coke Company, and being all of the land described in said deed as tract No. 1, except the three *parcel* owned by the Altizer Coal Land Company as aforesaid, and described in the parcels mentioned above. All of tract No. 2 in said deed; All of tract No. 3, in said deed, except the parcels No. 1 and 2 owned by the Buffalo Coal & Coke Company, and described in the description mentioned above. All of tract No. 4 described in said deed and the 40 acres described as situate at the mouth of Muddy Rock House Branch, and the lands described in said deed, except as embraced in the parcels above mentioned, were all dismissed from the suit of the State of West Virginia vs. Henry C. King, et als., as not being liable to sale for the benefit of the School Fund or subject to redemption by Henry C. King, as shown by exhibit "Buskirk Decree", filed with the petition of the Buffalo Coal & Coke Company and the Altizer Coal Land Company.

6th requirement: "He shall report the amount of timber, if any, that has been cut off of said grant since land became forfeited to the State of West Virginia, and what disposition has been made of the money derived from said sale."

Under this requirement your commissioner finds that by virtue of a decree entered in this cause on the 26th day of March, 1901, it was decreed that D. F. Frazee, trustee, successor in title to Alexander McClintock of the De Witt Clinton title, paid on the taxes due upon this land for timber taken off of the land, the sum of \$1,500.00 which was by said decree directed to be credited upon the taxes then due upon this land.

That by a decree entered in this cause on the 30th day of July, 1907, it was decreed that S. B. Robertson, Special Receiver, and Commissioner of School Lands, had in his hands for timber sold off of this land under decrees of the Court in this case, the sum of \$3,675.49, which was directed to be applied as a credit upon the taxes then due. Your com-

missioner credited both the \$1,5000.00 and the \$3,675.49 upon the taxes above found by him to be due upon the land as of the date when said orders were entered, respectively, and after allowing said credits your commissioner finds that the amount of taxes and interest for the years from 1863 to 1909 both inclusive upon the several parcels of land described above, and the various funds to which they belong are as follows: To-wit:

On parcels Buffalo Coal & Coke Company, No. 1, containing 998.4 acres, and No. 2, containing 10.8 acres, both aggregating 1,009.2 acres, for the purposes as follows:

State purposes	\$ 78.76
State School purposes	32.71
County Levy	271.23
District Triadelphia, Teachers Fund.....	174.99
District Triadelphia, Building Fund	86.01
District Triadelphia, Road Fund	43.68
Special County Levy	20.01

Total\$707.39

On parcel Buffalo Coal & Coke Company, No. 3, containing 257.5 acres, none of the timber was cut from this tract, and no credit is allowed thereon, and the taxes and interest amount to \$816.32, as found under requirement 3rd, and the amounts payable to each fund being under said 3rd requirement tabulated.

On parcels Altizer Coal Land Company No. 1, containing 671.6 acres, parcel No. 2, containing 1,057.93 acres, and Parcel No. 3, containing 444.4 acres, aggregating 2,173.57 acres, for the various purposes are as follows:

State purposes	\$ 173.25
State School purposes	69.91
County Levy	571.84
District of Triadelphia, Teachers' Fund.	371.18
District of Triadelphia, Building Fund...	197.00
District of Triadelphia, for roads	92.04
Special County Levy	42.77

Total\$1517.99

7th requirement: "He shall report who, if anyone, is entitled to redeem said survey or any part thereof so far as the title remains in the State, or who, *in* anyone, is entitled to the excess of the purchase money for which said land may be sold, over the taxes chargeable thereon, or which if the land had not forfeited would have been charged or chargeable thereon since the formation of this State, with interest at the rate of 12 per cent per annum, and the costs of this suit."

Under this requirement your commissioner reports that the Buffalo Coal & Coke Company and the Altizer Coal Land Company are the successors in title to DeWitt Clinton, the party to whom the grant involved in this *cayse* was made, by a regular chain of title exhibited with their petition and filed in this suit, and that they have superior title to say other claimant, and are entitled to redeem the following parcels or to the surplus proceeds of the sale after allowing the taxes as found under the sixth requirement in this report, and the costs of this suit: The parcels to which they are so entitled are as follows: Buffalo Coal & Coke Company, parcel No. 1, containing 993.4 acres, parcel No. 2, containing 10.8 acres, and parcel No. 3, containing 257.5 acres and the Altizer Coal Land Company, parcel No. 1, containing 671.6 acres, parcel No. 2, containing 1,057.93 acres, and parcel No. 3, containing 444.04 acres, which said parcels are described in the petition and answer of the said Buffalo Coal & Coke Company and the Altizer Coal Land Company.

Your commissioner further finds that by the decree entered on the 26th day of March, 1901, in this cause, it was adjudicated that D. F. Frazee, trustee, successor in title to Alexander McClintock, was entitled to the surplus of any purchase money which might be left remaining after paying the taxes, interest and costs, and by the exhibits in his case the Buffalo Coal & Coke Company and the Altizer Coal Land Company are successors in title to the said D. F. Frazee, trustee, to the respective parcels of land above set out.

Respectively submitted this 16th day of February, 1910.

ROBERT BLAND,

Commissioner in Chancery.

COSTS OF THIS REPORT.

To W. I. Campbell, witness	\$ 1.00
To C. J. Pearson, witness	14.30
To Frank C. Dudley, for publishing notice	28.22
To Robert Bland, Commissioner, for making this report	600.00
Total	<hr/> \$643.52

State of West Virginia

Logan County, to-wit:

I, Robert Bland, Commissioner in Chancery for the Circuit Court of said County do certify that I this day gave verbal notice to E. H. Greene, attorney for the School Land Commissioner of this County, Lilly & Shrewsbury, Ellison & England, E. T. England, Chas. Avis; that I this day completed my report in this case, and that said report is now in my office in the City of Logan, Logan County, West Virginia, open for inspection; and I do further certify that I gave notice, to M. F. Stiles, Charleston, West Virginia, Z. T. Vinson, Huntington, West Virginia, H. K. Shumate, Williamson, West Virginia, E. M. Showalter, Fairmont, West Virginia, J. S. Marcum, Huntington, W. Va., John A. Sheppard, Williamson, West Virginia, John B. Wilkinson, at this time at Wayne, West Virginia, by mailing to each of them a notice that my report in this case had this day been completed by me and is now in my office on said city open to inspection. Said notices being sent by regular course of mail, postage and addressed to each of said named persons at their present post office address.

Given under my hand this 16th day of February, 1910.

ROBERT BLAND,
Commissioner in Chancery.

EXHIBIT NO. 23.

Decree of Redemption.

At a Circuit Court for Logan County on the 4th day of May, 1910, the following decree was entered:

State of West Virginia

vs.) *In Chancery.*

Alexander McClintock & Others.

This day Robert Bland, Commissioner in Chancery of this Court, to whom this cause was heretofore referred by a decree entered herein, tendered and asked leave to file his report as such Commissioner, and it appearing from said report that said Commissioner gave the notice required by the decree of reference and has completed his report in the matters referred to him by said decree of reference, and after completing said report notified all the attorneys of record in the case of the completion of the same, and retained said report in his office ten days for exceptions and that no exceptions thereto were taken. It is *therefore* ordered that said report be and the same is hereby filed.

Now this cause coming on to be heard upon the plaintiff's bill and exhibits therewith filed and process duly served upon all of the defendants to answer said bill, upon the petition and answer of Alexander McClintock and exhibits therewith filed and general replication thereto, upon the petition of Henry C. King filed in this cause with general replication thereto, upon the amended bill filed by the plaintiffs in this cause and process duly executed upon all of the defendants to answer said amended bill, upon the answer of Henry C. King, to the amended bill filed in this cause, with general replication thereto, upon the petition and answer of S. S. Altizer, R. L. Joyee, E. T. England, J. B. Ellison, Rosie Ellison, Helen M. Cunningham, Frank Lee Benedict, Charles K. Crawford, Evelyn C. Clark, Helen Margaret Cunningham, Jr., and J. Benedict Cunningham, with general replication thereto; upon the petition and answer of the Buffalo Coal and Coke Company, and the Altizer Coal Land Company filed before said Commissioner, on the *15th* day of *February*, 1910 together with the exhibits filed with said petition with general replication to said petition and answer, as well as upon the proceedings and orders and decrees theretofore had in this cause, and the report of Robert Bland, Commissioner in Chancery, this day filed in this cause, and there being no exceptions or objections to said report, and the court *preceiving* no just grounds of exceptions thereto, the said report is in all things hereby approved and confirmed, and it appearing

from said report that all of the land described in the plaintiff's bill except the hereinafter described six parcels, are not liable to sale on account of the adjudication made in the cause of the state of West Virginia against Henry C. King and others by the Supreme Court of Appeals of West Virginia, as well as upon the account of the sale thereof confirmed to Stoddard and Hall on the 3rd day of November, 1898, in the cause of the State of West Virginia, against Jesse R. Irwin and others, lately pending in this Court.

It is therefore adjudged, ordered and decreed that all the land described in the plaintiff's bill embraced in a deed dated the 8th day of June, 1907, from W. K. Cowden, Trustee, and others to the Buffalo Coal and Coke Company, a duly certified copy of which is filed as Exhibit "No. 9" with the petition of the Buffalo Coal and Coke Company and the Altizer Coal Land Company, be and the same is hereby dismissed from this suit, except the following parcels not embraced in the suits above mentioned.

To the introduction and admission of which several decrees, pleadings and proceedings in said cause of State of West Virginia vs. Alexander McClintock and others, defendants, by counsel, objected, for the reason that said documents are, and that each of them is, irrelevant and immaterial and incompetent. The plaintiff does not derive title to the land in controversy from said decrees, and these defendants were not parties and are not privies to said decrees, petitions, bills and answers, and the recitals, allegations, admissions, denials and adjudications therein are not admissible as evidence against these defendants; and to the extent that the said decrees and proceedings in said cause appear to bind or are held to bind these defendants and affect their rights herein, the same are wanting in due process of law, and contravene Section 1 of Article 14 of the Amendments of the Constitution of the United States, and their admission in evidence in this cause by this court would contravene Article 5 of the Amendments of the said Constitution; which objection the court overruled, and admitted said several papers and proceedings to be received in evidence and read to the jury. To which ruling of the court, in admitting said decrees, pleadings and proceedings in evidence, the defendants, by counsel, excepted and prayed

that said exception be saved to them and be made part of the record of this cause, which is accordingly done. And this is defendants' Sixth Exception.

EXCEPTION NO. 7.

Be it further remembered that after the admission in evidence of the various papers and instruments of writing mentioned in the foregoing exceptions, the plaintiff, further to maintain the issues on its part, introduced in evidence a copy of the grant from the Commonwealth of Virginia to DeWitt Clinton, purporting to convey a tract of 142,000 acres, being Exhibit No. 24 referred to in said stipulation, in the words and figures following, to-wit:

EXHIBIT NO. 24.

*Robert Brooke, Esquire,
Governor of the Commonwealth of Virginia,
To all to whom these presents shall come:*

Greeting:

Know, Ye, That by virtue of Land Office Treasury Warrants Nos. 1311, issued the 22nd day of April, 1795, and No. 911, issued the 1st day of December, 1794, there is granted by the said Commonwealth unto DeWitt Clinton, assigns of David Booth, who was assignee of Austin Nichols, a certain tract or parcel of land containing 142,000 acres by survey bearing date the 10th day of June, 1795, lying and being in the counties of Montgomery and Wythe, the greater part thereof in the County of Montgomery, on Peter Huff's Creek, and Buffalo Creek, North-East Branches of Guyandotte River and on some South-West branches of *Cole* River, and on the head of Little *Cole*, a branch of Big *Cole* River, waters of the Kanawha, and bounded as followeth, to-wit:

Beginning at a sycamore marked HF, and WD., a beech and two sugar trees on the upper, South-West fork of little *Cole*, and on the South-West side thereof near a number of *pealed* trees three computed miles below Farley's Rooting Camp on said stream; thence S 12 W 1080 poles crossing a branch of Buffalo Creek at 480 poles to an ash, white walnut, two lynns, a sugar tree, and buckeye in the head

of a small hollow, waters of Peter Huff's Creek; S. 530 poles to a beech marked HF and sugar tree by a branch; thence extending down said branch the courses thereof 420 poles to a large sycamore, two sugar trees and a birch on the bank of Huff's creek at the mouth of said branch, and down the creek and binding thereon 4300 poles to three sugar trees, two sycamores and a beech on bank of Guyandotte River at the mouth of said creek; thence down the several courses of the River and binding thereon passing the mouth of Buffalo creek and several branches 6600 poles to two ash trees, a beech and buckeye, one marked WD at the lower end of a bottom opposite the upper end of an island 18 poles below the mouth of a branch; thence leaving the River N 40 E 5750 poles crossing several branches of Guyandotte and Little *Cole* to three sugar trees, a sycamore and two beech trees, one marked HF at the *supper* forks of Little *Cole*, N 82 E 3450 poles crossing Little *Cole* at the forks and some branches thereof, and crossing some branches of Big *Cole* to three beech trees, one marked HF a poplar and ash on the bank of Big *Cole* at the mouth of Elk Run one mile below the mouth of Toney's Fork and corner of a survey of Austin Nichols of 130,000 acres and with a line there of S 10 E 2910 poles to the River and crossing it and some branches, and crossing Marsh Fork and several branches to a Beech marked HF, a lynn and large poplar on a hill side, S 60 W 860 poles crossing a ridge and down a branch to a precipice of rocks at the mouth thereof at Nobusiness branch; thence S 62 W 1400 poles crossing some small branches and the South-West fork of Little *Cole* to the Beginning. But it is always to be understood that the survey upon which this grant is founded included 40,000 acres of prior claims (exclusive of the above quantity of 142,000 acres) which having a preference by law to the Warrants and Rights upon which this Grant is founded, liberty is reserved that the same shall be firm and valid and may be carried into Grants, and this Grant shall be no bar either law or equity, to the confirmation of the title or titles to the same, as before mentioned and reserved, with its appurtenances.

To have and to hold the said Tract or Parcel of Land,

with *it* appurtenances, to the said DeWitt Clinton (except as *hefore* Excepted) and *-his-* heirs forever.

In witness whereof, The said Robert Brooke, Esquire, Governor of the Commonwealth of Virginia, hath hereunto set his hand, and caused the Lesser Seal of the said Commonwealth to be affixed at Richmond, on the 19th day of February in the year of our Lord, 1796, and of the Commonwealth the 20th.

(Seal)

ROBERT BROOKE.

State of West Virginia,

Auditor's Office, City of Charleston, to-wit:

I, A. C. Scherr, Auditor of the State of West Virginia, do hereby certify that the foregoing is a true copy of a paper, purporting to be a grant from the State of Virginia to DeWitt Clinton, dated the 19th day of February, 1796, on file in said Auditor's Office among the certified copies of records received from the office of the Register of the Land Office at Richmond, Virginia, and *disposited* in the said Auditor's Office, under acts of the Legislature of West Virginia, passed February 24th, 1893, and the February 20th, 1897.

Given under my hand and official seal, at Charleston, W. Va., this 12th of December, 1906.

(Seal)

A. C. SCHERR,
Aditor.

CHARLES STONE.

And thereupon the plaintiff called as a witness in its behalf Charles Stone, who being duly sworn, testified that he was 46 years old, born and reared in Logan County, had been a surveyor since 1895, practicing his profession principally in Logan, Mason and Lincoln Counties, and was acquainted with Guyandotte River, Big Huffs Creek and Buffalo Creek in Logan County; that he was familiar with the boundaries set out in the deed from Jesse R. Irwin and others to Emma Idalia Pomeroy (Plaintiff's Exhibit No. 1) and had surveyed the said boundaries, beginning at a black oak tree on the south of Guyandotte River, marked with 8 hacks on north, east, south and west sides, running thence across Guyandotte River at the lower end of a farm owned

by H. C. Avis, running the line through to where it intersects the line between Logan and Mingo Counties on top of the ridge between Buffalo and Huff's Creek, finding several marked trees along the line, thence following the county line along the dividing ridge between Buffalo and Huff's Creek to a point near Grassy Spring, then leaving the ridge and with the county line to the top of a ridge at the head of Cub Creek and the waters of Huff's Creek, then following the county line along the ridge between Cub Creek, Huff's Creek and Elk River to a point immediately above the mouth of Leatherwood Creek of Guyandotte River; thence with the meanderings of the Guyandotte River to where he began. On this survey he ran the county line between Logan and Wyoming Counties from the end of the first line of the deed until it intersected with Guyandotte River. Witness was acquainted with the country lying between Big Huff's Creek and the right hand fork of Buffalo Creek, and it is embraced within the lines that he ran under the said deed. There was a tree marked according to the number of miles on the north, east, south and west sides for each mile on the line from Guyandotte River to the Wyoming-Logan County line. There were three that he did not find, but thinks he found all the others and they were marked in the manner indicated.

Witness surveyed part of the so-called Pomeroy deed in 1904, part in 1905 and the remainder in 1906 or 1907; had copies of junior patents and school land deeds and the calls of county lines, but had no papers describing said 1552 acres, but ran it out from the boundary lines of junior patents and school land deeds by which it was surrounded. Perry lived ten miles by the public road from the land in controversy in this suit, which lies partly on Huff's Creek and partly on the right hand fork of Buffalo Creek.

W. D. SELL.

And thereupon the plaintiff called W. D. Sell as a witness in its behalf, who testified that he lived in Charleston, West Virginia; had lived there fourteen years and for about ten years prior thereto had lived at Logan Court House; has been a civil engineer and land sureyor for twenty-nine years, first at Lancaster, Pennsylvania, for about three years, and

then with the Norfolk & Western Railroad Company in Wayne County, and what is now Mingo County. Has devoted practically all his time to land surveying; is familiar with Guyandotte River, Big Huff's Creek and Buffalo Creek; has surveyed Guyandotte River for miles above and many miles below Huff's and Buffalo Creek. In 1902 or 1903 witness was employed by Z. T. Vinson, attorney, of Huntington, West Virginia, to examine the records of the State and to go upon and examine the land upon Buffalo Creek with the view to finding and locating all junior patents and school land deeds and other claims of title within the DeWitt Clinton grant on the right hand fork of Buffalo, and made such investigation, platting out all the tracts he found in that territory, and then went on the ground and made search to verify the work he had done in the office, and secured from the residents along Buffalo Creek, up to the line of the Rutter-King grant, such information as he could—showing him the lines and corners of their land. Then he ran a connecting line up Buffalo Creek, having already surveyed a line up Huff's Creek, and went to Huff's Creek and made some surveys in the neighborhood of the land now in controversy near Jim Dolliver Brown's on Huff Creek. He had previously run a line of the Henry C. King claim, known as the "Sell N-4-E line," and in doing so had tied to various surveys as he *crossed* the country, and did the same in running the N-10-E line of the King land, and from all this work prepared the map of the territory for Vinson. In making this map he made use of all the information he could get from the records and from the people owning lands or living in the neighborhood embraced by his work; the map before the jury is a copy of the one made for Vinson.

"The land described in the declaration begins where I designate on the map at the corner of the Hinchman 95 acres and runs with the McDonald Survey, as I remember, to the Wm. Ward 500 acres and follows that and includes what I have marked "School land 76 acres." It follows the exact lines on the tract I have marked "School land 190 acres" and includes the tract marked "School land 229 acres." running around and excluding the William Elkins patent of 48 acres, down to Huff Creek at the upper end of the William Ward 310; from there it follows the lines of the

W. W. McDonald 206 acre school land tract up to the George R. McDonald 300 acre school land tract, and there follows the 300 acres to the 122 school land tract. In the compilation of this map this was paper work and it has apparently since developed that this 122 acres just probably touches the 300 acres school land tract. The declaration then follows around the 122 acres and comes back again to the 300; it follows the 300 around down to the Gordon McDonald 300 acre patent to the river. At that point the Gordon McDonald 300 acres in the declaration, the lower corner that seems to be 100 poles from Buffalo Creek up almost to the mouth of the Right Hand Fork. At that point the declaration goes across and takes a slope off the Hector 100 Pole line and goes back to it again and then strikes the Mullins 40 acres on the Right Fork of Buffalo and follows the 40 acres up to the Mitchell 63 acres to about the mouth of Meredith Hollow. It follows a straight line from there down to the Hinchman 95 acres and runs with the Hinchman 95 acres to the beginning. In this map I layed down the figures of the distances given in the declaration." The school land tract of 122 acres is excluded from this description. All the patents and school land sales that witness found in that territory he has laid down on said map. Witness has examined the description of the land claimed in the disclaimer filed by the defendants, except James Dolliver Brown, and has laid down said land on the map marked "W. D. Sell, Map A," which is a section of the larger map; this land is laid down in yellow, running from figure 1, 2, 3 and around to 71, and then to 1; the land in controversy in this suit, as shown by the disclaimer, is indicated by the figures 67, 68-K, 107, 10804, 3-A 3, 71-A, 71, 70 and back to 67; in preparing the description of the land in controversy witness took the defendants' plea and disclaimer and cut off that portion of the same embraced within the line 71-A to E-F-G-D-70 and to 71-A, because that lies outside of the disclaimer, (declaration?); he cut off a part of the William Claypool 37 acres across and a little piece of the Hinchman 95 acres. The rest of the 37 acres is excluded. Knows of no other patent, except the Robert Morris 500,000 acres, and the Morris 480,000 acres, and the DeWit Clinton 142,000 acres that covers the land in controversy. Witness is not familiar with the school land proceedings since he left Logan Court House; that none of

the school land sales up to that time, so far as he knows, covers the land in controversy. The description referred to is filed, marked "Exhibit No. 25," and is as follows:

EXHIBIT NO. 25.

Beginning at a stake in the Laurel Hollow on the line of Thomas Perry's land, which stake is on the south side of the right fork of Buffalo Creek, and is a corner of the land deeded by the heirs of John W. Hall deceased to the said I. P. Baer, et al, by deed dated April 24, 1911, and recorded in the office of the Clerk of the County Court of Logan County in Deed Book 34, page 458, and running thence up the ridge in the center thereof to the top of the hill between Riddell Branch of Huffs Creek and the right hand fork of Buffalo Creek, thence on with said ridge to a black gum and hickory a corner to a 28 acre survey bought by one Millard McDonald, and with the lines of said 28 acre tract S. 50 E. 561 feet to a poplar and hickory, corner of same, due west 300 feet, more or less, to a point on the line of said 28 acres (where a straight line drawn from the black gum and hickory, above named, to a chestnut oak corner to a survey of one H. C. Avis would intersect said due West line,) thence leaving the said 28 acres, and with a straight line (the course of which is fixed by the black gum and hickory above named as the northern end of same) to a chestnut oak corner to a survey of one H. C. Avis, and thence with said Avis line to a beech corner to a 500 acre survey made for or owned by Wm. Claypool, thence up Huffs Creek in a straight line (with such a course that will terminate at a stake on the north side of said Huffs Creek at a point where what is known as the east line of the Henry C. King 500,000 acre survey crosses said Huffs Creek, being the east line ran by W. D. Sell, Civil Engineer when he ran the lines by courses and distances as given in the patent thereof) a distance of about 800 feet, more or less, to a point where the last described line intersects the line of the 2165 92/100 acres mentioned in Plaintiff declaration, and with said 2165 92/100 acre lines N. 6403 W. about 400 feet, more or less to a stake, N. 3° 29' W 6358 13/100 feet to a stake on a hillside and about 200 feet from the right fork of Buffalo Creek and continuing said N. 3° 29' W. line, about 200 feet

to the south bank of said right fork of Buffalo Creek, and down the same on the south side, but following the meanders of said creek to a stake immediately opposite the beginning which stake is on the bank of the right fork of Buffalo Creek at the mouth of Laurel Branch at Marcum Hollow, thence a southerly direction a straight line to the place of beginning.

The land claimed by defendant James Dolliver Brown, is represented on the map beginning at figure 3, thence to 20, then following the lines of the 72 acres, 204-3-2 to 201, then to 105-4 and along to 3-A and 3. The lines of the boundary being shaded green; a portion of the line lies outside of the declaration and East of the line running from bottom to top of the map and marked ZW; this land of Brown's also embraces part of the land claimed by the other defendants. Witness has represented on map "Exhibit No. 12" the lines of the declaration and marked them in white ink; that land is embraced within the boundaries of the deed from Jesse R. Irwin to Emma I. Pomeroy; the land in controversy is also covered by the lease from Buffalo Creek Coal & Coke Company to the Del Carbo Coal & Coke Company. Knows Green Branch and Big Spring Branch. Green Branch comes into Huff's Creek near the mouth of Huff Creek and Big Spring comes in at the letter "W" on the large map. Flows north toward figure 10 on small map.

In preparing the map for Vinson, witness had recourse to the records of Logan County and took copies of all the surveys made for patents, as well as surveys made for school land sale, and also got copies from the state auditor's office and surveys and grants that were made in Cabell and Kanawha Counties that covered any of the territory. Surveys were made by the county surveyor of Logan County for the purpose of making sales of land in school land cases and these surveys witness platted out on his original, of which the one in evidence is a copy, and as no sales were made under those surveys they were not reproduced on the map in evidence.

Found part of the land in controversy had been surveyed out by the county surveyor, for the purpose of sale, as part of the DeWit Clinton grant; all the land in controversy in this suit and all the land described in the declaration lies on the north side of Huff's Creek and between that creek and

the right hand fork of Buffalo and extending three or four miles up Huff's Creek from the river.

Plaintiff then introduced in evidence the leases to Del Carbo Coal & Coke Company, "Exhibits Nos. 26, 27 and 28," the small map referred to marked "Exhibit No. 29" and the the large blue print marked "Exhibit No. 30." Said maps are filed herewith as part of this bill of exceptions and marked respectively "Plaintiff's Exhibit No. 29 with Defendants' Bill of Exceptions" and "Plaintiff's Exhibit No. 30 with Defendants' Bill of Exceptions."

Exhibits Nos. 26, 27 and 28 are omitted by agreement. They are leases made by the successor in title of the Avon Coal Company, leasing to the last named plaintiff the land in the declaration for coal mining purposes for a stipulated yearly royalty.

W. H. FILE.

And thereupon the plaintiff called as a witness W. H. File, who being duly sworn testified as follows: Is 32 years old, lives at Becklev, West Virginia, is an attorney at law, but was a practical land surveyor for about 5 years; followed land surveying in Logan County, and in 1906 surveyed lands on the right hand forks of Buffalo Creek and Big Huff's Creek for the McDonald heirs, and in 1907 for U. B. Buskirk, trustee. First ran a base line up Buffalo Creek and then at right angles a distance of 100 poles, and then ran a line parallel with the base line up Buffalo Creek to the right hand fork; the line of what is known to be the Hector Survey. Began at a point (indicated on map Exhibit No. 12) 1650 feet from the base line, as a beginning point, and ran to the corner of the Gordon McDonald 300 acres, and then with that tract to a 206 acre tract of the W. W. McDonald heirs, and with that tract to a corner of the William Ward 310 acres and the Claypool 90 acre tract and ran with the land of the latter to the corner of the Robert Claypool 229 acre tract and with two lines of that until I struck the William Claypool 229 acre tract and with two lines of that until I struck the William Claypool 90 acres again and with the two lines of the latter to what is known as the H. C. Avis tract on which J. D. Brown then resided, and then with two lines of that tract to

a corner—thinks it was a beech—and then down to a corner near the bank of Huff's Creek, cornering with the L. D. Hinchman 95 acre tract, and with two lines of that tract to a corner of the Robert Elkins 230 acres, and with that tract to the James Browing 69 acres, on which D. H. Cook then resided, and with it to the county line between Logan and Wyoming Counties, and with the county line to a point on the top of the dividing ridge between the right fork of Buffalo Creek and Huff's Creek near Grassy Spring, and then with the county line and Browning patent and line to the Rutter-Etting line, and with that line to a stake on the right fork of Buffalo close to the A. Lawson 200 acre tract; did not run the closing lines from the mouth of right fork of Buffalo to the stake on the Rutter and Etting line. The lines thus indicated are laid down in red on "Exhibit No. 12." Found the 37 acre tract located, approximately, as shown on "Exhibits No. 12, 29 and 30"—on the head waters of Riddle Branch. In running base lines up Buffalo Creek he had a copy of the Hector patent, or information calling for 100 Poles from either side of the center of the creek; don't know whether it was a patent or not. In running the McDonald property, he had the McDonald deeds and had the Claypool papers until he struck the property of J. M. Vance, then had his patent, and had a copy of the H. C. Avis deed in running the property where J. D. Brown lived, and had a copy of the calls of the county line copied from the records of Logan County; had information from Messrs. Lilly and Shrewsbury, attorneys for U. B. Buskirk, as to the Rutter & Etting line, and ran the Claypool 37 acres from the copy of the patent. Plaintiff's "Exhibit No. 31" is a copy of the field notes of the work witness has described, with the exception of the interior patent of 37 acres to William Claypool; it represents tract No. 4292 acres. (And is the same as the description in Exhibit No. 11.) It extends to the division line between Logan and Wyoming Counties close to where it crosses Huff's Creek, including the land in the declaration and other land besides; did not run the closing line—that was run by Mr. Pearson. The surveying witness did of the 4292 acres was for Buskirk, trustee, for use in the suit of State of West Virginia vs. Henry C. King and others and was done under the direction of Buskirk's counsel. The Mr. Brown, whom he found living within the

land surveyed, is the defendant James Dolliver Brown. The place where Brown lived was an old one, and he appeared to have been living there for a good many years. Endeavored to locate a 72 acre tract owned by the McDonalds, and offered to pay Brown to show where the corners were, but he refused to do so—was not willing to aid the McDonalds or Buskirk in their attempts to locate these lands. Thinks Brown was living on H. C. Avis tract of 76 acres, shown on "Exhibit No. 29" outside of the 4292 acres. The 72 acres is shown on "Exhibit No. 29" as "Nathaniel Browning 72 acres 1850," and lies east of the land in controversy. Is not certain that Brown lived on the 76 acres—whether his house was inside or outside of it. He farmed the 76 acres. In 1905 while surveying for the McDonalds, not far from where Brown lived, Brown talked to witness about there being a good deal of vacant land there, and witness discussed with him the possibility of ripening possession into title, and Brown said he had no deed covering the land. Witness told him he would try to get him a deed and he promised to give witness an interest in the property if he assisted in getting title for him. Witness went to Logan and discussed the matter with Naaman Jackson, and Mr. Jackson made Brown a deed to the property. Witness delivered the deed to Brown. Witness left Logan September, 1907, and the matter had not occurred to him again until he came here (to this trial) when it occurred to him that this deed was probably in controversy. The deed covers the land described in the plea of James Dolliver Brown, beginning at about the southern corner of the 76 acre tract, marked James D. Brown on Exhibit No. 29, and runs to a west corner of the Claypool-Browning 72 acre tract, marked "1850," from there to the top of a ridge near Meredith Hollow, and with the ridge to a corner of the William Claypool 37 acre tract on the head of Riddle Branch, thence to a corner of the H. C. Avis tract, marked "James D. Brown 76 acres," and thence to the beginning, shown by green lines on "Exhibit No. 29." Jackson did not claim to have any title to the property described in the deed he made to Brown.

H. C. PEARSON.

And thereupon the plaintiff called as a witness in its be-

half, H. C. Pearson, who testified that he was 29 years old, lives at St. Albans, West Virginia, is a civil engineer and land surveyor and has followed that occupation since 1903. In March, 1907, under the employment and direction of C. J. Pearson, a surveyor, he ran the lines on Brown—J. B. Mitchell 65 acres, crossing A. Lawson 200 acres to the right fork of Buffalo. These tracts are shown on map "Exhibit No. 12" extending from the right hand fork of Buffalo to Rutter & Etting line. Surveyed all the lines of those tracts as they are represented on map No. 12.

And thereupon, the evidence hereinbefore set forth in this bill of exceptions being all of the evidence introduced by the plaintiff up to that time, the plaintiff rested its case; whereupon the defendants, by counsel, moved the court to strike out all the plaintiff's said evidence, upon the ground:

First, that the said evidence did not show, or tend to show, any title in the plaintiff to the land in controversy. There was no attempt by said evidence to show that at the date of the deed from Jesse R. Irwin and others to Emma I. Pomeroy, "Plaintiff's Exhibit No. 1," the purported grantors therein had any title to the land in controversy, or to the land embraced in said deed, but, on the contrary, the evidence showed that whatever claim of title the said grantors or the said Pomeroy ever had was forfeited to the State of West Virginia; and the deed from Commissioner Wilkinson to Stoddard and Hall "Plaintiff's Exhibit No. 3," the only deed purporting to connect with the State, is not shown by the evidence to embrace the land in controversy, but is shown not to embrace it, and furthermore said deed contains an exception and reservation which would take the land in controversy out of the operation of said deed, if the land were embraced within the boundary of said deed.

Second, because all said evidence is incompetent, irrelevant and immaterial for the reasons urged against the same when it was offered in evidence by plaintiff, and was improperly admitted.

But the court overruled defendants' said motion, and refused to strike out said evidence, or any part thereof; to which overruling and action of the court in overruling said motion and refusing to strike out said evidence, the defendants, by counsel, then and there excepted and prayed that said exception be saved to them and be made part of the

record of this cause, which was accordingly done. And this is defendants' Seventh Exception.

EXCEPTION NO. 8.

Be it further remembered that after the plaintiff had rested its case and the court had overruled the motion of defendants to strike out and exclude the evidence introduced on behalf of the plaintiff, as shown in the foregoing exceptions, the defendants, to sustain the issues on their part and to show that the grant of 480,000 acres made to Robert Morris and the deed made by commissioner J. B. Wilkinson to William H. Stoddard and Amos C. Hall, purporting to convey a portion of said grant, plaintiff's "Exhibit No. 3" did not embrace the land claimed by plaintiff in its declaration, introduced in evidence a copy of said grant of 480,000 acres, dated March 23, 1795, marked "Defendants Exhibit No. 1" and which is in words and figures as follows, to-wit:

DEFENDANTS' EXHIBIT NO. 1.

Robert Brooke, Esquire, Governor of the Commonwealth of Virginia:

To all to whom these Presents shall come, Greetings:

Know Ye, That, by virtue of Land Office Treasury Warrants Nos. 472, 473, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 486, 487, 488, 522, 523, 524, 525, 526, 527, 528, 529, and 530 there is granted by the said Commonwealth, unto Robert Morris Esquire, of the City of Philadelphia, Assignee of Wilson Cary Nicholas, a certain tract or parcel of land containing 480,000 acres by survey bearing date the 10th day of September, 1794, lying and being in the County of Wythe on Tug and Guvandotte Rivers and the waters thereof and bounded as followeth (towit) Beginning at two poplars, a Walnut and Sugar Tree in a bottom on the North side of the Main fork of Tug River a branch of Sandy River a corner of a Survey of 500,000 acres of said Nicholas's and one of 150,000 acres of David Pattersons and with a line of the latter S. 53 W. 2560 poles crossing said River to Three White Oaks by a branch of said River thence leaving the same N. 25 W. 880 poles to five White Oaks a corner to survey of 300000 acres made for said Nicholas

and with the lines thereof N. 35 W. 1750 poles running 2 1/2 miles to said River and down the same to five Chestnut Trees and a double Poplar on the Bank of the same a small distance below the mouth of Elkhorn Creek N. 10 W. 1600 poles leaving the river and crossing a ridge between the same and Browns Creek a branch of said river and extending along a spur of the dividing ridge to five Chestnut trees on the top of the same at the place generally used for crossing from the mouth of Browns Creek on Tug River to Indian Creek a branch of Guyandotte, being a corner of another survey made for said Nicholas and Jacob Kinney of 320,000 acres and with the lines of the same and leaving the former N. 65 W. 3200 poles along the said ridge, some of the spurs thereof and crossing the same to a double Chestnut tree, a black Oak and Sourwood on the top thereof S. 50 W. 3940 poles along said ridge some distance and leaving the top of the same and crossing some of the spurs thereof chiefly on the south side and crossing some of the waters of Tug River to a Lynn and three Chestnut trees in a low gap of the same nearly opposite to the mouth of said river where it empties into Sandy River N. 25 W. 880 poles leaving said ridge and crossing some small branches of Guyandotte to two Poplars and two chestnut trees near a branch of said River thence leaving the lines of said Survey N. 6800 poles crossing Laurel Creek and several branches of the same, the dividing ridge between said Creek and Huffs or Cane Creek and crossing the last mentioned Creek a small distance above the mouth to three Sugar trees and a Buckeye by a small branch of Guyandotte River thence N. 85 E. 10050 poles crossing Guyandotte and several branches thereof to a line of a Survey of 500,000 acres made for said Nicholas and with the same S. 9700 poles crossing Guyandotte, Bransons Fork and Indian Creek to the Beginning with its appurtenances;

To Have And To Hold the said Tract or Parcel of Land, with its appurtenances, to the said Robert Morris and his heirs forever.

In Witness Whereof, The said Robert Brooke, Esquire, Governor of the Commonwealth of Virginia, hath hereunto set his hand and caused the Lesser Seal of the said Commonwealth to be affixed at Richmond, on the 23d day of

March, in the year of our Lord one thousand seven hundred and ninety five and of the Commonwealth the nineteenth.
(SEAL)

ROBERT BROOKE.

Land Office, Richmond, Va.

I hereby certify that the foregoing is a true copy from the records of this office. Witness my hand and seal of office, this 2d day of August, 1895.

S. P. EPES, (Virginia Land Office Seal)

Register of the Land Office.

And for the purpose of aiding the location of said 480,000 acre tract the defendants further offered in evidence a copy of the grant of 320,000 acres to said Robert Morris, dated March 4, 1795, "Defendants Exhibit No. 2," referred to in said 480,000 acre grant, and which is in words and figures following, to-wit:

"EXHIBIT NO. 2."

Robert Brooke, Esquire, Governor of the Commonwealth of Virginia:

To all to whom these Presents shall come, Greeting:

Know Ye, That by Virtue of Ten Land Office Treasury Warrants os. 228, 229, 230, 231, 232, 233, 234, 235, 371 and 372 there is granted by the said Commonwealth unto Robert Morris Esquire of the City of Philadelphia, Assignee of Wilson Cary Nicholas, who was assigns of Jacob Kinney for one moiety a certain Tract or Parcel of Land, containing 320,000 acres by survey bearing date the 1st day of April, 1794, lying and being in the County of Wythe and Russell, the greater part thereof in Wythe on both sides of Sandy Creek a branch of the Ohio, and bounded as followeth, (to-wit) Beginning at five Chestnut trees on the top of a ridge that divides the waters of the Tug fork of Sandy Creek from the waters of Guyandott at a place which is frequently used as a crossing place from the mouth of Brown's Creek on Tug River to Indian Creek a branch of Guyandott and near the head of Brown's Creek being a corner of a survey of Wilson Cary Nicholas's and with a line thereof S. 35 W. 36 1/4 miles crossing several branches of Sandy Creek viz: Tug fork, the Clear fork, Bartletts Creek, Sandy Creek, and

Bradshaws Creek to the end of a ridge that divides the waters of Panther Creek and Knox Creek two miles on the course S. 52 E. from a low gap in the ridge that divides the waters of Main Sandy Creek and the Louisa fork of Sandy at an old encampment, Thence N. 52 W. 11 miles along a ridge that divides the waters of Panther and Knox Creeks and leaving on the N. W. side the main dividing ridge and crossing some of the spurs of the same to two Walnuts, two Spanish Oaks and a Chestnut Oak on the of the ridge that divides Panther and Knox Creeks, Thence N. 30 W. 5 1/2 miles leaving the ridge on the S. West side and crossing between the head waters of Knox and Peters Creeks and Crossing Knox Creek about four miles from the head to four white Oaks on the N. West bank of the same near the mouth of a small branch, Thence N. 33 E. 21 miles crossing Panther Creek at 11 1/2 miles and crossing main Sandy Creek at 15 miles where little War Creek enters into the same on the N. W. side and up the said War Creek to the forks thereof and up the N. East fork to the head and along a ridge and crossing the same to two Poplars and two Chestnut trees on a branch of Guyandott 6 miles from the mouth of Little War Creek and Thence S. 25 E. 2 3/4 of a mile crossing said branch to a Lynn and three Chestnut trees in a low gap nearly opposite to mouth of Tug River and about four computed miles from the same, Thence N. 50 E. 12 1/2 and 1/16 of a mile continuing on a ridge two miles and leaving in on the S. East and crossing the heads of several branches of Tug River to a double Chestnut tree, a black Oak and Sourwood tree on the top of said ridge and Thence S. 65 E. 10 miles along said ridge and crossing several branches to the Beginning. But it is always to be understood that the survey upon which this Grant is founded includes 880 acres which having a preference by law to the Warrant and rights upon which Robert Morris's survey is founded liberty is reserved that the said 880 acres shall be firm and valid and shall have the same effect and may be carried into grant or grants and this grant shall be no bar in either law or equity to the confirmation of the title as before mentioned and reserved with its appurtenances.

To Have And To Hold the said Tract or Parcel of Land,

with its appurtenances, to the said Robert Morris except before excepted and his heirs forever.

In Witness Whereof, The said Robert Brooke, Esquire, Governor of the Commonwealth of Virginia, hath hereunto set his hand and caused the Lesser Seal of the said Commonwealth to be affixed, at Richmond, on the 4th day of March, in the year of our Lord one thousand seven hundred and ninety five and of the Commonwealth the nineteenth.

ROBERT BROOKE.

Land Office, Richmond, Virginia.

I hereby certify the within or annexed writing is a true copy taken from the Records of this Office. Witness my hand and seal of Office the 27th day of August, 1895.

S. P. EPES, (Virginia Land Office Seal)

Register of Land Office.

W. D. SELL.

And thereupon the defendants, further to maintain the issues on their part, called as a witness in their behalf, the said W. D. Sell, who testified as follows: Witness made map exhibited to him as "Defendants Exhibit No. 3," which was introduced in evidence, embracing some of the territory watered by Guyandotte and Tug Rivers and their branches. He laid down Guyandotte River on said map by actual survey from mouth of Little Huff Creek down to Hart's Creek and laid down Island Creek, Beech Creek, Knox Creek, and various forks of the same and Little Huff Creek, Nigger Branch and Tug River were also laid down from actual survey made by him. A number of years ago in proceedings then pending in the United States court, in which Henry C. King was a party, orders of survey were made in the districts of West Virginia and the western district of Virginia and under those orders witness ran lines of said 320,000 acre and 480,000 acre tracts and was at points of others also that were reputed to be corners of them and of other surveys. The beginning corner of the 320,000 acres is described as "five chestnuts on the top of a ridge dividing the waters of Tug fork of Sandy Creek and of waters of Guyandotte at a place that is frequently used as a cross-

ing place from the mouth of Brown's Creek on Tug River to Indian Creek, a branch of *Gutandotte*, and near the head of Brown's Creek being another corner of the survey for Nicholas;" witness was at that point, which is shown on map "Exhibit No. 3" by the letters EX on September 16, 1895. He there found five chestnut stumps on top of the ridge between Brown's Creek, a branch of Tug River, and a branch of Indian Creek of Guyandotte River, about 60 feet up to the right from where the old road crosses. Brown's Creek and Indian are both shown on the map, and EX is at the head of Brown's Creek. The town of Welch is just around the bend above the mouth of Brown's Creek about a mile. Witness then ran from the point EX, following along the red line from EX to DX reversing the lines of the 320,000 acres and running them in the direction called for in the 480,000 acre grant; ran the top of the ridge following an old trail from EX to DX, and at DX found a double chestnut 28 inches in diameter below the forks, the forks being 15 and 18 inches, the larger one marked. Found a 24 inch Black Oak, dead, 12 feet from the chestnut and a large sourwood 8 feet to the right—the roots of a large sourwood; continued from DX along the meandering of the ridge to the point CX on the map and there found a 36 inch chestnut, marked on the north side one hack, on the north-west side three hacks, and a 24 inch lynn—these stood in a gap about four miles from the mouth of Dry Fork. The patent called for "a lynn and three chestnut trees in a low gap and opposite from Tug River and about four computed miles from the same;" this gap was opposite the mouth of Dry Fork and is about four computed miles there from. Running from CX towards the point A, the timber called for being two poplars and two chestnut trees on a branch of Guyandotte River about six miles from the mouth of Little War Creek, missed this point 200 feet to the left. At A, which is known as "the Muzzle corner," he found two poplars and two chestnut trees on a branch of Little Huff Creek. There was then but one poplar standing. It was properly marked. There was a chestnut lying down out of which, on May 6, 1895, he had taken a block which counted back to the date of the patent. It was marked for one of the lines running to the south towards CX or towards P, but witness does not remember now which. This

tree was not marked on the north side. The standing poplar was marked with old marks towards the southeast or southwest and the mark on the north side did not look old. None of the courses or distances ran out identically with the calls of the original survey or patent. Also ran a line of the 320,000 acres from A to P, a common line between the 320,000 and 500,000 acres. The preceding line of the 320,000 acres from KX to P is described as crossing Knox Creek about four miles from the head. Witness did not find any evidence of a corner at KX, but went to the very head of Knox Creek and ran thence to P, which is about four miles from the head of Knox Creek, following the twists and turns of the creek. The call being for "four white oaks on the northwest bank of Knox Creek near the mouth of a small branch," witness found that the point P is on the northwest bank of Knox Creek, just above the small branch that comes in at that point. Witness ran the line from A to P; the course agrees very closely with that called for in the patent and crosses Panther Creek, Sandy River and the ridge between that and Guyandotte. The beginning corner of the 480,000 acres "two Poplars, a Walnut and a Sugar tree in a bottom on the north side of the main fork of Tug River, a branch of Sandy River, a corner of a survey of 500,000 acres of said Nicholas," is off the map to the right. The 500,000 acres referred to is known among the surveyors as the "Eastern 500,000 acres." The other 500,000 acres to the west, is shown on the map. This corner was described as a corner of the 150,000 acres surveyed for David Patterson, which would lie to the southeast of the point EX, and the 300,000 acres also mentioned in said survey lies southeast of the 320,000 acres, the line of the same running southeast from EX. The 300,000 acres would be partly off this map. This beginning corner is described as a double poplar on the bank of the river a small distance below the mouth of Elkhorn, and is located about a mile below the town of Welch. Reading from the patent, "leaving the river and crossing a ridge between the same and Brown's Creek, a branch of said river, and extending along a spur of the dividing ridge to five chesnut trees on the top of the same at the place generally used for crossing from the mouth of Brown's Creek on Tug River to Indian Creek, a branch of Guyandotte, being the corner of another survey

made for said Nicholas and Kinney of 320,000 acres"—that is where he found the five *chestnut* stumps at EX. This line comes up to EX from outside the map. The next calls of the 480,000 acre grant are "and with lines of the same" (meaning the 320,000 acres)—these lines are indicated on the map as EX, DX, CX and A. From the two poplars and two *chestnuts* at A he ran the next call "N. 6800 poles" N-4-F from A to M, as shown on the map. He did not find three sugar trees and a Buckeye, nor any corner trees nor any marked line beyond the point A. The grant calls for Little Huff Creek or Cane Creek and the line crosses Little Huff Creek, which is "regarded as Cane Creek;" the other Huff Creek, down the river, is known as Big Huff's Creek—it is shown on the map. The next line of the grant calls to run north 85 E. 10050 poles; it would now run N. 81 E. and part of the line is marked on the map, dotted line M through to B.

Taking the deed introduced by the plaintiff as "Exhibit No. 3," from J. B. Wilkinson, special commissioner to Stoddard and Hall, dated Nov. 12, 1898, and reading therefrom the boundaries, "beginning at two poplars, a walnut and sugar tree on the north side of the main fork of Tug River, a branch of Sandy, a corner of the survey for said Nicholas," that 500,000 acres is off the map to the right. "And one of 150,000 to David Patterson" is off the map to the right; and "with the line of the latter south 53 W. 2560 poles, crossing said river to three white oaks by a branch of said river, thence leaving the same N. 25 W. 880 poles to five white oaks, a corner of the survey of 300,000 acres made to said river and down the same to five *chestnut* trees and a double poplar on the bank of the same a small distance below the mouth of Elkhorn Creek"—that is near the town of Welch, in McDowell County; "N. 10 W. 1600 poles, leaving the river and crossing the ridge between the same and Prown's Creek, a branch of said river, and extending along the spur of the dividing ridge to five *chestnut* trees on the top of the same at the place generally used for crossing from the mouth of Brown's Creek on Tug River to Indian Creek, a branch of Guyandotte River, being a corner of another survey made for said Nicholas and Jacob Kinney of 320,000 acres"—the five *chestnut* stumps are at EX on

the map; and "with the lines of the same (meaning the 320,000 acres) and leaving the former (meaning the 300,000 acres) N. 65 W. 3200 poles, along the said ridge with some of the spurs thereof and crossing the same to a double *chesnut* tree, a black oak and a sourwood on the top thereof"—those trees he found at DX; "S. 50 W. 3940 poles along the said ridge some distance and leaving the top of the same, crossing some of the spurs thereof, chiefly on the south side, and crossing some of the waters of Tug River to a lynn and three *chesnut* trees in a low gap nearly opposite the mouth of the said river where it empties into Sandy River"—this point is at CX, marked "Lynn and *Chesnut*" opposite the mouth of Dry Fork, where the town of Iaeger now is. "N. 25 W. 880 poles leaving said ridge and crossing some branches of Guyandotte and two small poplars and two *chesnut* trees near a branch of said river"—this line is from CX to A in Wyoming County; "thence leaving the lines of said survey (meaning the 320,000 acres) N. 6800 poles crossing Laurel Creek and several branches of the same, the dividing ridge between said creek and Huff's or Cane Creek, and crossing the last mentioned creek a small distance above the mouth, to three sugar trees and a buckeye"—6800 poles north of A is the point M on the map; "thence N. 85 E. 10,050 poles" etc.—the line running to the point B.

The patch near the center of the map, colored yellow, represents the land described in the declaration and is a reduced copy from the drawing on a larger scale on the other map; it lies west of the western line of the 480,000 acres as he has run it, and outside of said 480,000 acres—no portion of the land in controversy lies inside the lines of the 480,000 acre grant as laid down on the map.

The red lines on the map running from NN and OO following Guyandotte River to AA and BB represent lines of the DeWit Clinton 142,000 acres; a part of this grant lies on the waters of Coal River and witness has not surveyed that portion, but has had some of the corners pointed out to him, but is only familiar with that end of the tract which comes down Huff Creek from the point south of OO and follows down Huff Creek 4300 poles to the mouth and down the river to the point stated. The call of 142,000 acre grant—"thence extending down said branch the courses thereof

420 poles to a large scyamore, two sugar trees and a birch on the bank of Huff Creek to the mouth of said branch," the line is from OO to OO in 1; "thence down said creek and binding thereon 4300 poles to three sugar trees and a beech on the bank of Guvandotte River at the mouth of said creek"—is down Huff Creek to the mouth as shown on the map; you can identify the point OO by running up the creek 4300 poles from the mouth of the creek; from the mouth of the said creek, "thence down the several courses of the river and binding thereon passing the mouth of Buffalo Creek"—the Buffalo Creek as shown on the map—"and several branches 2600 poles to two ash trees, a beech and a buckeye, one marked W. D. in the lower end of the bottom at the upper end of an island 18 poles below the mouth of a branch"—this is at figure 2. There was no timber standing there when witness was at that point, but figure 2 is at the lower end of a small bottom about 18 poles below the mouth of a small branch where Tom Lawson used to live and where a small island used to be; it is about 2600 poles from the mouth of Huff Creek. "Thence leaving the said river N. 40 E. 5750 poles, crossing several branches of the Guyandotte River and Little Coal" etc.,—to AA. The next line "thence N. 83 E. 3450 poles"—takes you off the map at BB.

The DeWit Clinton survey is the first of the large surveys witness met with when he went to Logan Court House, 22 years ago, and the first corner of a "big survey" ever shown him was at figure 2. Witness knew the land at that time as the Burr Wakeman land, Wakeman being the owner of the DeWit Clinton or the southern part of it. Witness went to Logan in 1891 and surveyed up in the neighborhood of said land and stayed with M. B. Mullins, who is mentioned in the papers in this case, and Mullins told him about this DeWit Clinton tract. Witness, at the request of counsel, lays down as much of the DeWit Clinton 142,000 acres on plaintiff's "Exhibit No. 12" as the map will accommodate, enclosing everything north of Huff Creek and east of Guvandotte River. The DeWit Clinton includes the land in the controversy in this case described in the declaration. All the land on said map "Exhibit No. 12" east of the line AM and north of Huff Creek is also inside of the DeWit Clinton 142,000 acre lines.

Tracts Nos. 1, 2, 3, and 4, aggregating 11,277.98 acres mentioned in the decree of Jan. 11, 1908, "Plaintiff's Exhibit No. 11," entered in State against King and others, all lie within the DeWit Clinton survey and within the so called Pomeroy deed. In examining into the amount of so called vacant land within the Pomeroy deed, witness had made an estimate that there were about 10,000 acres on Buffalo Creek and in that vicinity, and about 10,000 acres on Elk Creek and in that territory, and about 2 or 3,000 acres in the upper end of Mingo County in the neighborhood of Stafford's Branch—outside of the 11,000 acres above mentioned, there is about 10,000 acres on Elk Creek, and 2 or 3000 acres further south, all within the Pomeroy deed.

Cross Examination: Witness has laid on "Defendants' Exhibit No. 3" the lines dividing the 480,000 acres from the 320,000 acres. The patent call is N. 65 W. 3200 poles, the line from EX to DX is about right for that course, but is only about half the distance. The next call is S. 50 W. 3940 poles; the line from DX to CX departs about 30 degrees from that course and the distance is 3490 poles. The course and distance from CX to A varied about 5 degrees and 100 poles from the patent call. The patent call from A is "N. 6800 poles crossing Laurel Creek and several small branches of the same, the dividing ridge between said creek and Huff or Cane Creek and crossing the last mentioned creek a small distance above the mouth to three sugar trees and a buckeye, by a small branch of Guyandotte River;" the distance called for is about $21\frac{3}{4}$ miles, and if you stop south of Guyandotte River you have only run out about 6 miles.

Q. And in running the line from A to M on the map you have to disregard the call for any corner on the bank of the Guyandotte River? A. Yes, sir.

The next call is N. 85 E. 10,050 poles crossing Guyandotte River and several branches thereof to a line of a survey of 500,000 acres made for Nicholas; in running from M you do not cross Guyandotte River, except Toney's Fork, one of the forks near the end of the line. If you run the line north from A to Guyandotte River, the next line would cross the river immediately after you turn east. If the 480,000 acres be located by making a corner south of Guyandotte River, instead of at M, it would not embrace any of Logan and

Mingo Counties, nor any land on Big Spring Branch, Green Branch of Big Huff Creek. Was at the beginning corner of the 480,000 acres and had it pointed out to him about 16 years ago. If you run the courses and distances of the patent from that beginning corner those lines would embrace the land in controversy and would take in all the land in the Pomeroy deed. Knows in a general way about the so called "Sarver Survey;" always understood that a line of it crossed at the lower end of the Hugh Avis bottom, and that would be a little above figure 2 on the map. If you run the 480,000 acres from A to M you do not include any part of Mingo County.

Re-Direct Examination: In running the lines EX, DX and CX he followed the trail along the ridge represented by the red meandering line. The ridge is steep and narrow, dividing the watersheds of Guyandotte and Tug Rivers, and there is just room on top for a path, that is all. Following the ridge as he did, the distances were about the same between EX and DX and DX and CX as those given in the patent; the object in surveying the line in the manner he did was to determine whether or not they had not originally been surveyed in the same way instead of in direct lines. By following the ridge in the manner indicated he reached the corner trees, which appeared to be well known, as he had no difficulty in getting the people in the neighborhood to show them to him.

If one were to lay down the 480,000 acre grant by its courses and distances, paying no attention to corner trees found by him, as suggested upon cross-examination, it would not run with the 320,000 acres as required by the deed from commissioner Wilkinson to Stoddard and Hall (Plaintiff's Exhibit No. 3) but would overlap the 320,000 acres which is the oldest grant of the group, and would envelope it entirely or nearly so, and would also take a large part of the 300,000 acres, which is older, and would not run to the five chestnut trees at the head of Brown's Creek nor run with any line of the 320,000 acres as called for in said Stoddard and Hall deed. Is familiar in a general way with the holdings under the 480,000 and 320,000 acre grants which were divided up about in the forties and are held in part by the Lasher and Trimble interests; none of the lands claimed by them lie west of the point A. To include in the deed

from Commissioner McClure to Irwin, or from Wilkinson to Stoddard and Hall any land in Logan County you have to run from A across Guyandotte River the course and distance called for. Has known the Muzzle corner at A since 1893. It was pointed out to him as a corner of those surveys at that time; first by one of the Lesters who lived down the creek 4 or 5 miles, and with whom he stopped the night before, and who described the location in such a way that witness walked directly to it the next day; it is up on the left fork of Muzzle Fork of Little Huff, a little above a splash dam on a little flat at the mouth of the hollow. There was no trouble in locating the place when described with a little exactness. Has not seen the block that he took from the chestnut tree at the Muzzle corner for about ten years; the last time he saw it was, he thinks, in the U. S. court at Lynchburg. Has never run any of the lines of the so called Sarver's Survey, but it began at the beginning corner and ran by course and distance only.

Located the land of the defendants on "Exhibit No. 29" from deed from Naaman Jackson to Defendant Brown, the land he included in that deed is shown in green line by figures 3-204-201 and back to 105-4-3-A and 3; part of that land lies outside of the declaration and the controversy in this suit. About the month of October witness went out on the land in controversy with the intention of doing some surveying, but found it was unnecessary, as he was able to lay down on the map such matters as he was required without actual measurement after examining the premises. The branch that runs through the land in controversy is called the Jim Dolliver Branch up in that neighborhood—has known it about 20 years by that name. There is a clearing within the boundaries of the deed from Jackson to Brown and is noted on "Exhibit No. 29" by the dotted portion and is limited by the letters: P running right up the branch to 203 and up the hill to N, then down along M to L-3-A and back to P. The clearing is cultivated and under fence. It apparently had been cleared at least 10 or 15 years ago—but some of it perhaps a little more recently—anywhere from 10 to 15 years back. About 30 acres is actually enclosed and about $\frac{1}{2}$ of it is embraced in plaintiff's declaration, and about 200 acres of the land described in Brown's deed and embraced in the declara-

tion, the tract being about 300 acres instead of 500 as stated in the deed.

If the 480,000 acre grant were to be located by course and distance, disregarding the corner trees and monuments and the calls to run with the 150,000 acres, the 300,000 acres, and the 320,000 acres, it would have embraced in 1884 and 1885, about 200,000 acres of land in Logan County not included within the junior patents and deeds from the commissioners of school lands—that is the so called Sarver Survey would, at the time of the deed made by Commissioner McClure to Irwin, have included the 200,000 acres of land not embraced in such junior patents and school land deeds.

Thereupon JAMES DOLIVER BROWN, one of the defendants, was called as a witness in his own behalf and testified as follows: Lives in Logan County on a branch of Peter Huff Creek, formerly called Meadow Rock Branch, but now called by everybody the Jim Dolliver Branch; has lived there 39 years and claims to own the land; has claimed it for 39 years; has a deed that calls for 500 acres. Bought the land in the first place from a man who claimed it and promised to make a deed but went away without doing so; the land was 18 miles from Logan Court House and there was no one in the neighborhood of the land who could draw a deed. Paid for the land, but the seller moved away and neglected to have the deed made and died some time afterwards, about 10 or 15 years; he had a tenant named Farley living on the land at the time of the sale. There was a small house and a little clearing at the time. Witness went into possession of the property at the time of his purchase. The house stood just above the 76 acre tract. Has been clearing the land claimed by him from year to year since he has lived there and has never missed raising a crop. The land was originally timbered but he has cut and removed during the 39 years of his occupancy practically all the merchantable poplar timber. Has cut 25 or 30 rafts. Has not cut much in the last few years as he had previously cut off the merchantable timber, but cut a lot of telephone poles two years ago and took them to Guyandotte and sold them. There is a little merchantable poplar left. Sold some timber to Anthony

Cook, some to Charley Cook, and some to Lee Joyce and old man Altizer. They were dealing in timber, cutting and selling. Timber cut and removed by him came from all over the land he claimed and the cutting was strung along over a number of years. Has opened some coal veins on the property and uses coal for domestic purposes; has been using the coal for 30 years. Has ranged and grazed his cattle all over this land and has pastured or ranged cattle for others for hire—ranging oxen for Mr. Avis some years ago and some cattle for a man last summer. They both paid him. Nobody else has ever cut timber on the land he claimed, except himself and those to whom he sold timber. No one else has been in possession of the land in the past 39 years and no one ever contested his right to the land nor his possession until this suit was brought.

At one time Mr. File was at his place, counting timber for the McDonalds on their land, and got to talking to him about witness having no deed for the land although he had been in possession of it, and File said that if he would give him the bounds of the land he would get him title to it, and he gave him the bounds and got the deed from Jackson and recorded it. Tried to get the land put on the land books for taxation; went down to the county court and got Mr. Miller to go before the Board, then in session, and get the court to put the land on the land books. Miller got the court to make and sign the necessary order then Mr. Shrewsbury (one of the plaintiff's counsel) came in and told the county court to hold up on it—that he and his clients owned the land. The county court held up a while and Shrewsbury said the county attorney should come in, and he came in and he told the court that he could not see that it made any difference about the deed being transferred to the land books—it was at witness' risk if he wanted to put the land on and pay the taxes—that it was his money he was paying and if anyone else had a prior right it was their land. The court adjourned for dinner and when they came back after dinner "it seemed as though the state's attorney had been handled a little and he came in another way then. He said not to put it on at all." Has made efforts two or three times since to get the land entered on the land books,

and was willing to pay the taxes if the State would accept them.

The Cooks, to whom he sold timber from said land, live on Huff Creek above him, and Altizer lived at the mouth of Buffalo Creek. The Cooks had lived from boyhood on Huff Creek, and witness and they were raised together as boys. The fires have come into the branch on to the land he claimed a umber of times. Always had fought it to keep it from injuring the land or timber and had fought it away and kept it off the land when possible.

Was acquainted with J. W. Hinchman at the time he was commissioner of School lands; he knew where witness lived. Knew U. B. Buskirk when he was commissioner of school lands; Buskirk knew where witness lived, saw him many times along on Huff Creek. Buskirk was engaged in the timber business.

Has had cattle ever since he lived on the said land and has endeavored to keep them within the boundary claimed by him and to keep other cattle off the same.

Had a deed from the commissioner of school lands for Cross Examination: Had a deed from the commissioner of school lands for the tract of 76 acres lying partly on Jim Dolliver Branch. Got it some 10 years after he moved to the branch. The house he first moved into was built before he came on the branch and is not the one in which he is now living. The latter is situated below the former on the same branch and below the 76 acres; moved into this house after purchasing the 76 acres. Did some clearing on the 76 acres. The branch flows down through that tract from the land witness now claims; the clearing is along the branch, on one side of it, taking in the hillside—there is very little bottom land. About 5 or 6 acres of the 76 acres is cleared. Went with Sell when he surveyed around witness' clearings and improvements and the land described by him is all the cleared land on the land claimed by witness, except such as has been cleared of the merchantable timber.

The time witness endeavored to get his land on the land books, which was objected to by Mr. Shrewsbury, was before witness was acquainted with Mr. Baer, whom he has known 5 or 6 years. Got his deed from Jackson in 1905 and recorded it shortly afterwards. Only made one effort to

get the land on the land books and at that time Judge Miller was his counsel and Mr. Shrewsbury opposed the effort. The land is now on the land books and was charged with taxes for 1914.

Re-Direct: Was living up on the branch at the time he bought the 76 acres and moved down there because it was nearer the main creek and better ground. Had not cleared more land because he had gotten to old to do so. Could not say that there is an acre of good bottom land on the branch, putting it all together. The land is mostly rough and rocky, but some of it is smooth. The cleared land is enclosed with rail fencing from timber cut off the land. People in the immediate neighborhood and living along Huff Creek have all along known that witness claimed the land. These people gave the name of Jim Dolliver to the branch—first thing he knew people were calling it the Jim Dolliver Branch; Jim Dolliver is part of witness' name.

Raised a family of 17 children on the land claimed by him, some of whom have married and moved away. The 76 acres was sold away from him by the court under a deed of trust, but possession has never been taken from him.

JAMES MARION VANCE

The defendants, further to maintain the issues on their part, introduced as a witness James Marion Vance, who being duly sworn testified as follows: Lives in Triadelphia district, Logan County on Big Huff's Creek; is 59 years old; lived in the neighborhood of Huff's Creek all his life and has known the defendant, James Dolliver Brown, all his life and knows the land on which he lives—it is about 4 miles above where witness lives and adjoins land witness has owned since August 1901. Lived within one-half mile of each other until Brown was married then he moved to what was then called Meadow Rock and now called Jim Dolliver Branch—has been called that since Ulysses Hinchman made a survey there, probably of the 76 acres, and gave the name of Jim Dolliver to the branch, and all the neighbors have called it that for years. Brown settled on the creek about 1873 or 74 and has lived there ever since and has claimed the boundary of land within that branch ever since he went there—claimed that he bought it

of Harrison White, and from the time he moved there was very particular and stopped people from hunting on the land, as he thought he ought to have it all to himself, and used it as his own—has cut the timber off and hauled it out and sold it to different parties. Sold some to Charlev Cook, C. F. Cook and Anthony Cook, and has taken off the timber ever since he has lived there, timbering all over the boundary from year to year. The timber was cut and hauled down to the creek and from there hauled down to the river and rafted 35 to 40 logs to a raft, then it was run out to Guyandotte and sold to who ever would buy it. This was the ordinary method of cutting, hauling, rafting and disposing of timber in the neighborhood and Brown cut, hauled and disposed of timber in this manner. During all this time witness lived within three or four miles of Brown. At one time Cook paid witness \$20.00 for Brown, who owed witness a little store account. Witness was selling goods, and Anthony Cook paid him the \$20.00 at the store. C. L. Brown his brother paid \$20.00 about the same time in November 1882. Brown has cleared up the branch and farmed it ever since he has lived there. The land was very rough and not well adapted to farming. Brown has kept other people from using the land claimed by him on the branch, has told them that he did not allow it, he wanted it for his own use and his own stock, and the ginseng and other herbs he wanted for his own family. The last timber witness knew of Brown cutting was two or three years ago, and he cut some then for telegraph poles. They were cut during the summer and fall. He was engaged at it up until cold weather. Brown had cut merchantable timber from time to time along in June, July and August when it would peal, and in the fall he would raft it and in the spring run it out. He would drop it down by the mouth of the creek in the winter time, and in February and March when the waters would break up and the ice go out he would throw it into the river and raft it and sell it there or at Logan or Guyandotte. Has known Brown to take four or five rafts a year. The branch was very well timbered and Brown has cleared it pretty well up. Has cleared up all the big poplar, gum, lynn, ash, white oak and chestnut oak down to about 18 inches at the stump. Brown has raised a big family and he and his children have

cleared up a good part of the branch. A very little patch was cleared when Brown moved there by a fellow named John Farley, who had gone there under Harrison White; this little clearing was 200 or 300 yards up the branch above where Brown now lives. Nobody else but Brown has cut any timber off the land claimed by him, except those who purchased from him.

W. R. LILLY

And further to maintain the issues on their part, defendants introduced as a witness in their behalf W. R. LILLY, who being duly sworn, testified as follows: Is 40 years old, resides at Logan, and is one of the counsel for plaintiff in this case, and was one of the counsel for U. B. Buskirk in State against King and others, and for Buffalo Coal and Coke Company in State against McClintock and others, and was living in Logan at the time those suits were pending in the circuit court for Logan County and upon appeal to the supreme court of appeals of West Virginia. Has been introduced to E. M. Showalter, whose name is signed as counsel for the State of West Virginia to the amended bill in State against McClintock and others, filed October 18, 1906, but is not well acquainted with him; he lived at Fairmont at that time and has lived there ever since—knows about this only by hearsay.

And thereupon the following question was propounded to the witness by counsel for the defendants:

“Q. The commissioner’s report, “Exhibit No. 22,” filed by the plaintiff, shows that he began the discharge of his duties under the decree of reference September, 1907, and then, that no party appearing, it was continued at various times for that reason for about two and one-half years, until Feb. 7, 1910, and that on Feb. 15, 1910, the Buffalo Coal and Coke Company and Altizer Coal Land Company appeared and filed a joint answer, and on the same day depositions were taken and the exhibits referred to filed, and on the 16th day of February, the next day, the report was completed and filed. What parties were present in person, or represented by counsel in those proceedings before the commissioner?”

To which question and any answer thereto, the defend-

ants, by counsel, objected, upon the ground that the same was and would be immaterial.

The counsel for the defendants thereupon stated and avowed that it was his purpose to prove by the witness, W. R. Lilly, and that, if permitted to do so, could and would prove by him, that no counsel or person representing the State of West Virginia, or Henry C. King, or representing any person or corporation, except said Buffalo Coal & Coke Company and Altizer Coal & Land Company, appeared before said Commissioner between the time of the filing of the answer of said corporations and the making and filing of his report by said Commissioner; and that afterwards, and within a week or less, the regular judge of said circuit court of Logan County, having called a special term for the purpose of some condemnation proceedings, left the town of Logan, and that the witness W. R. Lilly was elected special judge to preside at said special term, and after the proceedings for which said special term was called were concluded the said Lilly vacated the bench and one C. H. Hudson was elected by the few members of the bar present to continue the proceeding at said special term; and thereupon the said Lilly and other counsel of said Buffalo Coal & Coke Co. and Altizer Coal & Land Co. presented to said Special Judge Hudson, in the absence of, and without the knowledge of, any other party to said suit or other counsel, the decree which has been offered in evidence in this case and marked "Plaintiff's Exhibit No. 23," which decree said Special Judge Hudson indorsed for entry and delivered to the clerk of said court; and that on the same or the following day and before said decree was spread upon the records of said court the said regular judge, J. B. Wilkinson, returned to Logan, and, being advised of the action herein indicated with reference to the presentation and indorsing of said decree, withdrew the same from the hands of the clerk and directed him not to enter the same of record until further action was had thereon, and said decree was not entered and had not been entered at the convening of said court at the next regular term thereof in April; that on the first day of said April term, Maynard F. Stiles, counsel for Henry C. King, appeared in court for the avowed purpose of taking action with reference to said Commissioner's re-

port, but that said matter was deferred by understanding of said counsel and some of the counsel for Buffalo Coal & Coke Co., and Altizer Coal & Land Co. and was to be taken up later in said term upon notice; that afterwards, on the 4th day of May, 1910, the said regular judge, J. B. Wilkinson, having vacated the bench because of interest in some matter to be heard before said court, a member of the bar of said court, then residing at Madison, in Boone County, was elected special judge, and thereupon the said decree, which had theretofore been indorsed by said Hudson and withheld from entry by the regular judge of said court as aforesaid, was presented to said special judge then holding said court by counsel representing said Buffalo Coal & Coke Co. and Altizer Coal & Land Co., and in the absence of said E. M. Showalter and in the absence of any counsel for the State of West Virginia or said Henry C. King or any other person except said two corporations, with the statement that the same was an uncontested matter, and the said decree was indorsed for entry, without any examination either of the report of said chancery commissioner or the evidence upon which the same was based, or of the decree itself; that the said counsel for said Henry C. King, arriving at Logan Court House that day, came into court the following morning, and, discovering that said decree had in the meantime and during the evening been spread upon the record, tendered and filed his affidavit, and the counsel for said corporations filed affidavits in opposition thereto, and thereupon the said King, by his said counsel, on the morning of the 5th day of May, 1910, moved the court, then being held by the said judge who had indorsed said decree, to vacate and set the same aside and allow said King to be heard in said cause for the reason that the said decree had been entered in the manner aforesaid, and upon a report of which said King or his counsel had no knowledge during the hearing or making of same and because of collusion in the procuring of said decree to be entered and because said special judge had, by his own confession, made no examination of said cause or of said decree, which said motion, being resisted by said Buffalo Coal and Coke Co., and said Altizer Coal & Land Co., was overruled by said special judge; that during none of the hearings or proceedings after the filing of the answer of

said King in said cause in 1907, "Plaintiff's Exhibit No. 10," either before said Commissioner or before said court was any person advised of said proceedings except Buffalo Coal & Coke Co. and Altizer Coal & Land Co., and their counsel.

To the answering of which question aforesaid, and to the proving of the alleged facts and matters set forth in said avowal, the plaintiff, by counsel, objected, upon the ground that the said facts and matters were immaterial; which objection of the plaintiff the court sustained, and to which action of the court in sustaining said objection and refusing to permit the witness to answer the question propounded, and in refusing to permit the defendants to introduce evidence to prove matters set forth in said avowal, the defendants, by counsel, then and there excepted, and prayed that said exception be saved to them and be made part of the record of this cause, which is accordingly done. And this is defendants' Eighth Exception.

EXCEPTION NO. 9.

And thereupon, after the introduction in evidence of the matters hereinbefore set forth, the defendants, further to maintain the issues on their part, introduced in evidence a copy of a deed dated March 25, 1886, from W. B. McClure, Commissioner of School Lands of Wyoming County, to Jesse R. Irwin, marked "Defendants' Exhibit No. 4," and being the deed referred to in "Plaintiff's Exhibit No. 3," and which is in words and figures as follows, to-wit:

DEFENDANTS' EXHIBIT NO. 4.

This Deed made this 25th day of March, in the year of our Lord, One Thousand Eight Hundred and eighty-six, between W. B. McClure, Commissioner of School Lands for the county of Wyoming, of the first part, and Jesse R. Irwin of Oceania, Wyoming, and state of West Virginia, of the second part.

Witnesseth; That where the said party of the first part in pusuance of the authority vested in him by a decree of the circuit court of the county of Wyoming, made on the

12th day of April, 1882, in a proceeding by petition on the chancery side of said court, "In the Matter of School Lands" therein pending in which the party of the first part, as commissioner of school lands for the county of Wyoming was plaintiff, and Jesse R. Irwin and others were defendants, did sell the real estate hereinafter mentioned and conveyed according to the terms and conditions required by said decree, at which sale the said Jesse R. Irwin became the purchaser for the sum of Thirty-Eight Hundred (\$3800.00) Dollars, and the said Court having by a subsequent decree made in the said cause and proceeding on report of the said sale having been duly made and filed, confirmed the said sale on the 15th day of July, 1885, to the said Jesse R. Irwin, and the said Jesse R. Irwin having fully paid the said purchase money, and the same having been duly reported to said court and said report confirmed, the said court on the 15th day of July, 1885, by an order entered in the cause aforesaid directed a deed for the said real estate to be made to the said Jesse R. Irwin by the said party of the first part.

Nos therefore this Deed witnesseth: That the said W. B. McClure, Commissioner of School Lands as aforesaid has this day granted and conveyed unto the said Jesse R. Irwin, party of the second part, the following real estate, situate in the counties of Wyoming, McDowell and Logan, W. Va. on the waters of Guyandotte and Big Sandy and bounded and described as follows:

Beginning at two poplars, a walnut and sugar tree on the north side of the main fork of Tug river, a branch of Sandy river, a corner of a survey of 500,000 acres of said Nicholas and one of 150,000 acres of David Patterson, and with a line of the later S. 53 W. 2560 poles, crossing said river to three white oaks by a branch of said river, thence leaving the same N. 25 W. 880 poles to five white oaks, a corner to a survey of 300,000 acres made for said Nicholas and with the lines there of N. 35 W. 1750 poles running two and a half miles to said river and down the same to five chestnut trees and double poplar on the bank of the same, a small distance below the mouth of Elk Horn Creek, N. 10 W. 1600 poles, leaving the river and crossing a ridge between the same and Brown's creek, a branch of said river and extending along a spur of the dividing ridge to five chestnut

trees on the top of the same at the place generally used for crossing from the mouth of Brown's creek on Tug river to Indian creek, a branch of Guyandotte, being a corner of another survey made for said Nicholas and Jacob Kenny of three hundred and twenty thousand acres, and with the lines of the same, and leaving the former N. 65 W. 3200 poles along the said ridge some of the spurs thereof and crossing the same to a double chestnut tree, a black oak and sourwood on the top thereof, S. 50 W. 3940 poles along said ridge some distance and leaving the top of the same and crossing some of the spurs thereof chiefly on the south side and crossing some of the waters of Tug River to a lynn and three chestnut trees in a low gap of the same nearly opposite to the mouth of said river where it empties into Sandy river, N. 25 W. 880 poles, leaving said ridge and crossing some small branches of Guyandotte to two small poplars and two chestnut trees near a branch of said river, thence leaving the lines of said survey N. 6800 poles crossing Laurel creek and several branches of the same, the dividing ridge between said creeks and Huffs or Crane creek and crossing the last mentioned creek a small distance above the mouth to three sugar trees and a buckeye by a small branch of Guyandotte river, thence N. 85 E. 10,050 poles crossing Guyandotte and several branches thereof to a line of a survey of 500,000 acres made for Nicholas and with same S. 9700 poles crossing Guyandotte, Bronsons fork and Indian creek to the beginning, containing by survey Four Hundred and Eighty Thousand (480,000) acres, excepting and reserving therefrom all junior claimants and patents protected by the constitution and laws of this state and also reserving and excepting therefrom all lands heretofore sold by the commissioner of school lands of either of the counties of McDowell, Logan or Wyoming, this conveyance expressly reserving herein that the same does not include any lands of said junior claimants or purchaser from the commissioner of school lands of the counties of Wyoming, McDowell or Logan as set forth in decrees entered in said cause at the July term, 1885, of the circuit court of Wyoming county, West Virginia to which decrees reference is here had and herein conveying Forty Thousand acres of land, to-wit: Twenty Thousand acres in said county of Logan; Ten Thousand acres in the

county of McDowell and Ten Thousand acres in the county of Wyoming, be the same more or less, and being the amount reported by Wm. T. Sarver, Com'r in the cause aforesaid to which report reference is also had.

To have and to hold the said real estate and premises with all the right, title and interest of the State therein to the said Jesse R. Irwin, his heirs and assigns forever, subject to the reservations and exceptions above set forth.

Witness the following signature and seal.

W. B. McCLURE. (Seal)

Signed, sealed and delivered in the presence of,

H. L. CHANDLER,

HENRY ALTON.

State of West Virginia,

County of Wyoming, To wit:

I, F. P. Roach, Clerk of the County Court of the County and State aforesaid do hereby certify that W. B. McClure, whose name is signed to the writing above bearing date on the 25th day of March, 1886, has this day acknowledged the same before me in my office of Clerk of the County Court of Wyoming county, West Virginia, and thereupon the same is duly admitted to record in my said office.

Given under *mn* hand and official seal this 25th day of March, 1886.

(Seal.)

F. P. ROACH, Clerk.

A true copy from the record of my office, to-wit: Deed Book "J," page 56, etc.

Teste.

C. F. STEWART, Clerk.

Per A. M. STEWART, Dep't.

(Stamp.)

And thereupon, the defendants, further to maintain the issues on their part, and for the purpose of showing that if the plaintiff had any title to the land in controversy it was as tenant in common with J. B. Ellison and I. P. Baer trustees, introduced in evidence the following copies of deeds, marked "Defendants' Exhibit No. 5, Defendants' Exhibit No. 6, and Defendants' Exhibit No. 7," which are in words and figures as follows, to-wit:

DEFENDANT'S EXHIBIT NO. 5.

This indenture, made this 25th day of March, 1886, between Jesse R. Irwin, of Oceana, Wyoming county, West Virginia, of the one part, and Charles F. Thomas of Wilmington New Castle county, Delaware, of the other part, witnesseth:

That the said party of the first part for and in consideration of the sum of one dollar, lawful money of the United States, in hand paid, and other valuable considerations to him duly paid before the delivery hereof hath bargained and sold, and by these presents doth bargain and sell, grant and convey, to the said party of the second part, his heirs and assigns forever, one undivided fourth part of the tract or parcel of land situate lying and being in the counties of Wyoming, Logan and McDowell in the State of West Virginia, and the counties of Pike, Kentucky and Buchanan, Virginia, which said tract of land is known as the Robert Morris grant and contains about 480,000 acres of land, of which about 200,000 acres are situate in Wyoming county, about 167,500 acres are situate in McDowell county and about 110,000 acres are situate in Logan county, West Virginia, and about 1,500 in Pike county, Kentucky, and about 1000 acres in Buchanan county, Virginia, which said tract of land is particularly described by a map or survey of said tract made by Wm. T. Sarver under a decree of the Circuit Court of Wyoming county, West Virginia, and filed in the clerk's office of said county and State; the above acreage subject to such reservations as are provided for by the decree of the Circuit Court of Wyoming County dated July 15, 1885, and which said tract of land is known "*an-*" described as follows, to wit: Beginning at two poplars, a walnut and sugar tree in a bottom on the north side of the Main fork of Tug river, a branch of Sandy river, a corner of a survey of 500,000 acres of said Nicholas and one of 150,000 acres of David Patterson, and with a line of the latter S. 53° W. 2,560 poles, crossing said river, to three white oaks by a branch of said river; thence, leaving the same N. 25° W. 880 poles to five white oaks, a corner to a survey of 300,000 acres made for said Nicholas, and with the line thereof N. 35° W. 1,750 poles, running two and a half miles to said river and down the same, to 5 chestnut

trees and a double poplar on the bank of the same a small distance below the mouth of Elkhorn creek, N. 10° W. 1,600 poles, leaving the river and crossing a ridge between the same and Brown's creek, a branch of said river, and extending along a spur of the dividing ridge, to five chestnuts on the top of the same, at the place generally used for crossing from the mouth of Brown's creek on Tug river to Indian creek, a branch of Guyandotte, being a corner of another survey made for said Nicholas and Jacob Kenney of 320,000 acres, and with the lines of the same and leaving the former N. 65 W. 3,200 poles along the said ridge, some of the spurs thereof, and crossing the same, to a double chestnut, a black oak and sourwood on the top thereof, S. 50° W. 3,940 poles along said ridge some distance, and leaving the top of the same and crossing some of the spurs thereof, chief on the south side, and crossing some of the waters of Tug river, to a lynn and three chestnut trees in a low gap of the same nearly opposite the mouth of said river where it empties into Sandy river, N. 25° W. 880 poles, leaving said ridge and crossing some small branches of Guyandotte, to two small poplars and two chestnut trees near a branch of said river; thence leaving the lines of said survey, N. 6,800 poles, crossing Laurel creek and several small branches of the same, the dividing ridge between said creek and Huff's or Cane creek, and crossing the last mentioned creek a small distance above the mouth, to three sugar trees and a buckeye by a small branch of Guyandotte river; thence N. 85 E. 10,050 poles, crossing Guyandotte and several branches thereof, to a line of a survey of 500,000 acres made for Nicholas, and with the same S. 9,700 poles, crossing Guyandotte, Brown's fork and Indian creek, to the beginning, together with all the tenements hereditaments and appurtenances and all the estate, title and interest thereunto belonging to the said undivided fourth part of the aboves described land, and the said party of the first part doth further covenant and agree that he will warrant and defend generally the above granted premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns forever.

In witness whereof, the said party of the first part, hath

hereunto set his hand and seal the day and date first above written.

JESSE R. IRWIN. (Seal)

Signed, sealed and delivered in the presence of—

H. L. CHANDLER,

HARRY ALTON.

State of West Virginia,

County of Wyoming, To wit:

I, F. P. Roach, clerk of the County Court of the county and State aforesaid, do hereby certify that Jesse R. Irwin, whose name is signed to the writing above, bearing date on the 25th day of March, 1886, has ahis day acknowledged the same before me in my office of clerk of the County Court of Wyoming county, West Virginia, and thereupon the same is duly admitted to record in my said office.

Given under my hand and official seal this 25th day of March, 1886.

[County Court West Virginia, Wyoming County.]

F. P. ROACH, Clerk.

State of West Virginia,

Logan County, To wit:

In the County Clerk's Office of Said County.

I, S. Altizer, clerk of the County Court of Logan County, do hereby certify that the foregoing deed, with the certificate of acknowledgement and of recordation in the County Court of Wyoming county, West Virginia, thereto attached, was this day presented to me, and thereupon the same was duly admitted to record in my office.

Given under my hand and the seal of said office this March 27th, 1886.

S. S. ALTIZER, Clerk.

[County Court West Virginia, Logan County.]

("I," p. 395, &c.)

J. CARY ALDERSON, Deputy,
For S. S. ALTIZER, Clerk.

DEFENDANT'S EXHIBIT NO. 6.

This indenture, made this twenty-first day of August, A. D. 1886, between Jesse R. Irwin, of Oceana, Wyoming county, West Virginia, of the first part, and Charles F. Thomas,

of Wilmington, New Castle county, Delaware, of the second part, witnesseh:

That the said party of the first part, for and in consideration of the sum of one dollar, lawful money of the United states in hand paid, and other valuable considerations to him duly paid before the delivery hereof, hath bargained and sold by these presents doth bargain and sell, grant and convey to the said party of the second part, his heirs and assigns forever, one undivided fourth part of the tract or parcel of land situate, lying and being in the counties of Wyoming, Logan and McDowell in the State of West Virginia, which said tract of land is known as the Robert Morris grant and contains about 480,000 acres of land, of which about 200,000 acres are situate in Wyoming county, about 167,500 are situate in McDowell county, and about 110,000 are situate in Logan county, West Virginia, and about 1,000 acres are situate in Buchanan county, Virginia, which said tract of land is particularly described by a map or survey of said tract, made by Wm. T. Sriver under a decree of the Circuit Court of Wyoming county, West Virginia, and filed in the clerk's office of said county and State. The above acreage subject to such reservations as are provided for by the decree of the Circuit Court of Wyoming county, dated July 15th, 1885, and which said tract of land is known and described as follows, to-wit: Beginning at two poplars, a walnut and a sugar tree in a bottom on the north side of the Main fork of Tug river, a branch of Sandy river, a corner of a survey of 500,000 acres of said Nicholas and one of 150,000 acres of David Patterson, and with a line of the latter S. 53 W. 2,560 poles, crossing said river, to three white oaks by a branch of said river; thence leaving the same N. 25 W. 880 poles to five white oaks a corner to a survey of 300,000 acres made by said Nicholas, and with the lines thereof, N. 35 W. 1,750 poles, running two and a half miles to said river, and down the same to five chestnut trees and a double poplar on the bank of the same; a small distance below the mouth of Elkhorn creek, N. 10 W. 1,600 poles, leaving the river and crossing a ridge between the same and Brown's creek, a branch of said river, and extending along a spur of the dividing ridge to five chestnut trees on the top of the same at the place generally used for crossing from the mouth of Brown's creek on Tug river

to Indian creek, a branch of Guyandotte, being a corner of another survey made for said Nicholas and Jacob Kinney of 320,000 acres, and with the lines of the same and leaving the former N. 65° W. 3,200 poles along the said ridge, some of the spurs thereof, and crossing the same, to a double chestnut tree, a black oak and sourwood on the top thereof, S. 50 W. 3,940 poles along said ridge some distance, and leaving the top of the same and crossing some of the spurs thereof, chiefly on the south side, and crossing some of the waters of the Tug river, to a lynn and three chestnut trees in a low gap of the same nearly opposite the mouth of said river where it empties into Sandy river, N. 25 W. 880 poles, leaving said ridge and crossing some small branches of the Guyandotte, to two small poplars and two chestnut trees near a branch of said river; thence leaving the lines of said survey N. 6,900 poles, crossing Laural creek and several small branches of the same, the dividing ridge between said creek and Huff's or Cain creek, and crossing the last mentioned creek a small distance above the mouth, to three sugar trees and a buckeye by a small braner of Guyandotte river; thence N. 85 E. 1050 poles, crossing Guyandotte and several branches thereof, to a line of a survey of 500,000 acres made for Nicholas, and with the same S. 9,700 poles, crossing Guyandotte, Bronson's fork and Indian creek, to the beginning, together with all the tenements, hereditaments and appurtenances and all the estate, title and interest thereunto belonging to the said one undivided fourth part of the above described land; and the said party of the first part doth further covenant and agree that he will warrant and defend generally the above granted premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns forever, except a certain mortgage for the sum of twenty-five thousand dollars, wherein the said Jesse R. Irwin is the mortgagor and Nathaniel R. Benson is the Mortgagee. The further condition of this deed is such that if the said party of the second part shall and will pay, or cause to be paid, to the party of the first part, his heirs, executors, administrators, assigns or representatives, the unpaid balance of the proceeds of a certain mortgage of twenty-five thousand dollars, made by the said party of the first part to one Nathaniel R. Benson and dated the twenty-fifth day of March, A. D. 1886, then

and in that case to be and remain in full force and effect, otherwise to remain and be considered as inoperative until such unpaid balance as aforesaid shall have been paid and the conditions of the aforesaid mortgage discharged.

In witness whereof, the said party of the first part hath hereunto set his hand and seal the day and year first above written.

JESSE R. IRWIN. (Seal)

Signed, sealed and delivered in the presence of witness—

J. Y. STAFFORD,

H. L. CHADLER.

State of West Virginia:

In the Clerk's Office of the County Court of Wyoming County.

I, F. P. Roach, cvlerk of the County Court of said county and State, do hereby certify that Jesse R. Irwin, whose name is signed to the writing above, bearing date on the 21st day of August, A. D. 1886, has this day acknowledged the same before me in my said office in the — county, and thereupon the same, together with this certificate, is duly admitted to record in the said office.

(Given under my hand and official seal this 21st day of August, A. D. 1886, at 2:30 o'clock p. m.

[County Court, West Virginia, Wyoming County.]

F. P. ROACH,

Clerk Wyoming County Court, West Virginia.

State of West Virginia,

Logan County Court Clerk's Office, To wit:

The foregoing deed was this day presented to me in my office, and the same together with the certificate of acknowledgment and recordation thereon) written, was duly admitted to record in my said office.

Giver under my hand and seal of said Court on this 23 day of August, A. D. 1886, at 10 o'clock a. m.

S. S. ALTIZER,

Clerk County Court Logan County, West Virginia.

("I," p. 525, &c.)

A copy.

Teste:

J. CARY ALDERSON, Deputy.

For S. S. ALTIZER, Clerk.

DEFENDANT'S EXHIBIT 7.

This deed made this 23 day of October A. D. 1911, between C. F. Thomas of the first part, and J. B. Ellison and I. P. Baer, Trustees of the second part;

Witnesseth, That for and in consideration of the sum of Two Hundred Dollars, paid in hand, the receipt whereof is hereby acknowledged, the said party of the first part do grant unto the parties of the second part, with covenants of no warranty, the following described property, to-wit:

All the right, title and interest of the party of the first part to the following boundary of land in Logan County, West Virginia on the waters of Peter Huffs Creek and the right hand fork of Buffalo Creek and bounded as follows, to-wit:

Beginning at a stake in the *Laurell* Hollow on the line of Thomas Perry's land, which stake is on the south side of the right hand fork of Buffalo Creek and is a corner of the land deeded by the heirs of John W. Hall deceased to the said I. P. Baer et al dated the 24th day of April, 1911, and recorded in the County Court Clerk's Office of said Logan County in Deed Book No. 34, at page 458, and running thence up the ridge in the center thereof to the top of the hill between *Riddell* Branch of Huffs Creek and the right hand fork of Buffalo Creek, thence on with said ridge to a black gum and hickory a corner to a 28 acre survey bought by one Millard McDonald, thence crossing the ridge in a straight line to a chestnut oak corner to a survey of one H. C. Avis, and thence with said H. C. Avis line to a beech corner to a 500 acre survey made for or owned by Wm. Claypool, thence up Huff's Creek in a straight line from the Claypool beech to a stake on the bank of Peter Huffs Creek on the north side thereof at a point where what is known as the east line of the Henry C. King 500,000 acre survey crosses said Huffs Creek, being the east line as run by one W. D. Sell, Civil Engineer when he ran the lines by course and distances as given in the patent thereof, disregarding natural monuments, thence with the said east line as run by said Sell, N 4 E up the mountain with the lower or west line of a tract of land containing 200 acres more or less conveyed to one

J. M. Vance by one Jesse R. Irwin in the year 1900 or 1901 which last mentioned 200 acres more or less boundary in now in litigation between said J. M. Vance and the Buffalo Coal & Coke Company, a corporation, et al, and is now pending in the Court of Appeals of West Virginia, and then still on with said King line and Vance line to the right fork of Buffalo Creek to a poplar, thence down the right hand fork of Buffalo Creek on the south side thence but following the meanders of said creek to a stake immediately opposite the beginning, corner which stake is on the bank of the right hand fork of Buffalo Creek at the mouth of the Laurel Branch or Marcum Hollow, thence in a southerly direction a straight line to the place of beginning, containing (1050) one thousand and fifty acres more or less, after exclusions as follows:

But the following lands are excluded from the operations of this deed and are not hereby conveyed or intended to be conveyed, viz:

All those parts of a 200 acre tract and a 66 acre tract on said right fork of Buffalo patented to one Anthony Lawson which lie within the boundary above described also all that portion of the said Claypool 500 acre tract lying within said boundary, also all the land which the said J. M. Vance purchased at the sale of the Evan Brown lands after his death, which are covered by the said boundary which last named lands were conveyed to said Vance by a Special Comr. and with which lands said Vance has been assessed. All of which tracts are excluded from the operation of this deed, but the party of the first part does not warrant the title. He only conveys such title as he has without any liability on his part.

Witness the following signatures and seal the day and year first above written:

C. F. THOMAS (Seal)

State of Delaware,

New Castle County, SS:

I, Thomas S. Lewis, a Notary Public in and for the County and State aforesaid, do certify that C. F. Thomas whose name he signed to the writing above, bearing date on the 23 day of October, 1911, has this day acknowledged the same before me in my said county.

Given under my hand and seal of office this 23 day of October, 1911.

THOMAS S. LEWIS,
Notary Public.

THOMAS S. LEWIS,
Notary Public,
Appointed Dec. 9, 1910.
Term expires Dec. 14, 1914.
Delaware.

West Virginia: In Logan County Court Clerk's Office.
Oct 24 1911.

The foregoing deed was this day duly admitted to record.

Teste: W. I. CAMPBELL, *Clerk.*

A true copy.

Teste. W. J. CAMPBELL,
Clerk Logan County Court, W. Va.

And thereupon W. D. SELL, being re-called by the defendants, further testified as follows: From defendants' Exhibit No. 7, the deed from Thomas to Ellison and Baer, trustees, witness has laid down on plaintiff's "Exhibit No. 29" the boundary tinted in yellow and designated by the figures and letters 67, H, K, 107, 106, 4, 3, A, 3, E, F, G, D, 70, 69, 68, 67. All of the land thus indicated lying west of the line ZW is within the declaration in this case. The said defendants' Exhibit No. 7 mentions certain tracts which are reserved from the conveyance; witness knows the general location of all said tracts and none of them is located within the land in controversy in this case.

The cleared land claimed by defendant Brown on the Jim Dolliver Branch would be correctly described as follows: Beginning on the east of the line of the 76 acre school land tract where it intersects the Jim Dolliver Branch, thence up the branch with its meanderings until it strikes the line running from Huff Creek at the right fork of Buffalo, described in plaintiff's declaration as running N—29 W, thence with that line through the cleared land to the fence the distance of 300 feet, more or less, thence down the creek to the fence and along the edge of the clearing with its meanderings until it strikes the line of the 76 acre school land tract, thence with that line S 10 W to the begin-

ning, containing about 15 acres, more or less. When witness was on the premises for purpose of making survey, defendant Brown showed him the description from a survey already made and he checked the same up. This clearing is altogether on the left hand fork of the creek as you go up, and it comes down to the west line of the land in controversy; namely, the eastern line of the 76 acre tract.

And thereupon the defendants rested their case and the plaintiff did the like.

And the foregoing evidence, set out in this bill of exceptions, being all the evidence introduced on behalf of the plaintiff and defendants upon the trial of said cause, the plaintiff, at the conclusion of said evidence, moved the court to direct the jury to find a verdict in its behalf for all the land claimed by plaintiff in its declaration, except the land cleared and inclosed by the defendant James Dolliver Brown, to the granting of which motion and the giving of such direction to the jury for the plaintiff, the defendants, by counsel, objected, but the court overruled said objection and gave such direction, and thereupon the jury re-

turned its verdict as directed; to which ruling and action of the court, in granting said motion, and directing verdict for the plaintiff for all the land in controversy, except that held by defendant Brown within enclosure, the defendants, by counsel, then and there excepted and prayed that said exception be saved to them and be made part of the record of this cause, which is accordingly done. And this is defendants' Ninth Exception.

And the foregoing nine exceptions and this bill of exceptions are by the court approved, signed and sealed and made part of the record of this cause this 8th day of June, 1915.

BENJ. F. KELLER, (Seal)
District Judge.

(Endorsed)
Filed this 8th day of June, 1915.
EDWIN M. KEATLEY, Clerk.

ORDER ALLOWING WRIT OF ERROR.

And at another day, to-wit: At a District Court of the

United States for the Southern District of West Virginia, continued and held at Charleston, in said District, on Thursday, the 2nd day of December, 1915, the following order was made and entered of record.

Buffalo Creek Coal and Coke Company, a Corporation,
Plaintiff,

vs. No. 630. Ejectment.

H. C. Jones et als., Defendants.

This day came the defendants by their counsel and presented to the court a petition praying for a writ of error from the Supreme Court of the United States to review the judgment entered herein on the 3d day of December, 1914, and the order and judgment entered herein on the 30th day of March, 1915, together with an Assignment of Errors alleged to have been committed by the court in this cause; upon consideration whereof it is ordered that such writ of error be and the same is hereby awarded as prayed for, and directed to issue. Bond is fixed at \$500.00.

BENJ. F. KELLER,
District Judge.

The petition for writ of error and assignment of errors referred to in the foregoing order are in the words and figures as follows:

PETITION FOR WRIT OF ERROR AND ASSIGN-
MENT OF ERRORS.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA.

Buffalo Creek Coal & Coke Company, et al, Plaintiffs,
vs. In Ejectment.

H. C. Jones et als., Defendants.

PETITION OF DEFENDANTS FOR A WRIT OF
ERROR TO THE SUPREME COURT.

To the Honorable Benjamin F. Keller, Judge of Said Dis-
trict Court:

Now come the defendants in the above entitled cause,

whose names are hereunto subscribed, by their counsel, and conceiving themselves to be aggrieved by the judgment of the court rendered and entered herein in favor of the plaintiff and against the said defendants on the 3d day of December, 1914, and by the judgment and order of said court entered herein on the 30th day of March, 1915, refusing to vacate said judgment, and set aside the verdict directed herein, and grant defendants a new trial, and by certain rulings of the court, upon the trial of said cause, respectfully represent and show that the said judgment, orders and rulings of said court are, as said defendants are advised, erroneous and prejudicial to the just rights of said defendants in the following respects, to-wit:

ASSIGNMENT OF ERRORS.

FIRST. The said court erred in admitting in evidence, over the objection of defendants, the deed set out in the bill of exceptions herein, in First Exception, dated July 28, 1893, and purporting to be a deed to Jesse R. Irwin, Harris Hoyt, Marie E. Hoyt, Alvin Irwin and Marie Irwin to Emma Idalia Pomeroy, purporting to grant to said Pomeroy "their right, title and interest in and to" the land therein mentioned, being a supposed 20,000 acres, more or less, in Logan County, West Virginia, and lying northeast of the Guyandotte River; because there was no evidence in the record that the pretended grantors in said deed had, and because they did not have, any right, title or interest in or to said land, and said deed was ineffectual to pass any title to or interest in said land to the said Pomeroy, and was incompetent and immaterial as evidence in said cause.

SECOND. The said court erred in admitting in evidence, over the objection of said defendants, the copy of the record of the chancery cause of State vs. Irwin et als., from the circuit court of West Virginia for the county of Logan, set out in defendants' Exception No. 2 in said bill of exceptions, which record consists of:

(A) The report of the commissioner of school lands of Logan County of a list of forfeited lands.

(B) An order of the circuit court of West Virginia, for Logan County, entered May 3, 1897, filing the report of Joseph Hinchman, commissioner of school lands of said

county, showing "the forfeiture of 43 tracts of land situated in the county of Logan, numbered in said report from 1 to 43, for the non-payment of taxes due thereon," and directing said commissioner to institute a chancery suit in said court, in the name of the State, for the sale of said tracts.

(C) The bill of complaint of the State of West Virginia vs. Jesse R. Irwin, Harris Hoyt, Charles F. Thomas, Mary Irwin, Virginia Irwin, Ethel Irwin, Clara Irwin, Alvin Irwin (the last five being the widow and heirs at law, respectively, of Alvin Irwin, deceased) Emma Pomeroy, J. B. Wilkinson and Marie Hoyt, filed at July, 1897, rules, in which the complainants set forth the purchase, by the sheriff of Logan County in behalf of the State, of sundry tracts of land at a sale thereof in 1895 for delinquent taxes, the reporting of such tracts, so purchased by the sheriff, to the State auditor and by the auditor to the commissioner of school lands and by the latter to said circuit court, the said lots including "Tract No. 42, containing 20,000 acres, forfeited in the name of Alvin Irwin and Marie E. Hoyt for the non-payment of taxes due thereon for the year 1893, also "Tract No. 43 in said report (of the commissioner of school lands) containing 20,000 acres, forfeited in the name of Emma I. Pomeroy for the non-payment of taxes due thereon for the year 1894;" alleging that by reason of the failure of the former owners of the said tracts to redeem the same within the time required by law the title had become forfeited to and vested in the State, and that no part of said land had been redeemed or otherwise disposed of, but remained the absolute property of the State and liable to be sold for the benefit of the school fund; that the persons named as defendants are all the persons known to the plaintiff to be former owners of said two tracts at the time of forfeiture, and all the persons in whose name the same were forfeited, or who were claiming title to or any interest in said lands, so far as known to plaintiff. Said bill prayed that said cause be referred to a chancery commissioner to report upon said land, as required by law, and that the same be sold for the benefit of the school fund, and for general relief.

(D) Summons issued upon said bill, endorsed, "Legal service of the within summons accepted by us, Harris

Hoyt, Marie Hoyt, C. F. Thomas, Emma Pomeroy and Mary Irwin, by Jesse R. Irwin, agent and attorney in fact," and due service by the sheriff upon J. B. Wilkinson and Jesse R. Irwin.

(E) Decree of said Logan circuit court, reciting services upon the defendants, and referring said cause to J. E. Peck, Sr., chancery commissioner, to report each parcel of land mentioned in the bill that is liable to sale for the benefit of the school fund, and the location thereof and number of acres therein, the amount of taxes and interest thereon and to what fund belonging, in whose name said land was forfeited and the present owner or claimant thereof, and any other matter that may be deemed pertinent or be required by any party in interest to report; and empowering said commissioner to have the necessary surveying done, and requiring him to give notice required by law.

(F) Notice by said commissioner to the said defendants and all unknown owners of the land mentioned in plaintiff's bill as "one tract of 20,000 acres, situated on the north side of Guyandotte River, Triadelphia District, Logan County, West Virginia, forfeited in the name of Emma Pomeroy for the non-payment of taxes due thereon for the year 1895. Also one tract of 20,000 acres forfeited in the name of Alvin Irwin and Marie Hoyt for the taxes of 1893," situated in said district, being "the same lands formerly owned by defendants Jesse R. Irwin, Harris Hoyt, Marie Hoyt and C. F. Thomas," and that said commissioner would enter upon the discharge of his duties under said decree of reference, February 8, 1898, at the court house of said county.

(G) Proof of publication of the foregoing notice for four successive weeks, ending February 3, 1898.

(H) Commissioner's report, in which he finds: (First) that in March, 1886, Jesse R. Irwin held a deed from W. B. McClure, commissioner of school lands of Wyoming County, West Virginia, for 20,000 acres of land on the east side of Guyandotte River, Tridelphia District, Logan County, which was returned delinquent for nonpayment of taxes, and was not redeemed and became forfeited; that in 1887 said land was sold for delinquent taxes to H. K. Schumate; that in 1892 it was placed back on the land book with

four years back taxes, which were paid with interest; that in 1886 Jesse R. Irwin deeded an undivided one-fourth of said land to Harris Hoyt, an undivided one-fourth to Alvin Irwin, an undivided one-fourth to C. F. Thomas; that in 1887 Alvin Irwin deeded his one-fourth to Jesse R. Irwin; that in 1893 Jesse R. Irwin, Harris Hoyt, Alvin Irwin and Marie Irwin deeded 20,000 acres to Emma Pomeroy, which was returned delinquent for 1893 in the name of Alvin Irwin and Marie Hoyt; that in 1894 it was returned delinquent in the name of Emma I. Pomeroy as 16,000 acres, 4,000 acres having been transferred to Minago County, and in 1896 was dropped. (Second) That the taxes were as set forth in a schedule annexed, (not copied into said record). (Third) That said land was forfeited in 1886, one-fourth in the name of Alvin Irwin, one-fourth in the name of Harris Hoyt, and one-fourth in the name of Jesse R. Irwin and one-fourth in the name of C. F. Thomas; that in 1893 the whole 20,000 was forfeited in the name of Alvin Irwin and Marie Hoyt, in 1894 the whole amount of 20,000 acres in the name of Emma Pomeroy, and in 1895, 16,000 acres forfeited in the name of Emma Pomeroy, and for 1896-7 was dropped from the books. (Fourth) That he had no surveying done because he believed the State could only recover on the number of acres deeded by Commissioner McClure to Irwin; that Millard and Bruce McDonald had filed with the commissioner a deed from Irwin for certain timber, and a receipt for taxes on 890 trees.

(I) Order, entered November 1, 1897, appointing J. B. Wilkinson guardian ad litem for Harry, Virginia, Ethel, Clara and Alvin Irwin, infants, and filing his answer as such guardian ad litem.

(J) Answer of said infants, by guardian ad litem, alleging that they are incapable of understanding or protecting their interests, and submit themselves and their rights to the protection of the court, praying that no decrees, prejudicial to them, be entered.

(K) Decree of sale, entered April 29, 1898, noting the presentation of exceptions to commissioner's report by Edward Browning, Thomas Tiller, Bruce McDonald and Millard McDonald (not parties to the suit) and the overruling of said exceptions and the filing of a petition of

Bruce and Millard McDonald, to be made defendants, setting up claim to certain timber on Big Spring and Green Branches of Huffs Creek; holding that the said lands are forfeited and liable to sale for the benefit of the school fund, and that at the date of such forfeiture Alvin Idwin and Marie E. Hoyt had title thereto superior to all other claimants, and that Jesse R. Irwin, grantee of Alvin Irwin and Emma I. Pomeroy, is entitled to any excess for which the lands may sell over and above taxes, interest and costs, which taxes and interest are fixed at \$7,955.19, and decreeing that unless said Jesse R. Irwin and Emma I. Pomeroy, or some one for them, shall, within thirty days from the rising of the court, pay off the whole of said taxes, interest and costs, including the statute fee of \$20.00, then it shall be the duty of J. W. Minchman, commissioner of school lands, to sell "the lands in the plaintiff's bill mentioned" at public auction, at the front door of the court house, after publishing and posting notice. The decree refers the matter of the claim of Bruce and Millard McDonald to the timber on Huffs Creek to Commissioner Peck, to ascertain the title thereto and the value of the timber cut by them which they are permitted to remove.

(L) Notice by J. W. Hinchman, commissioner of school lands, of proposed sale, giving notice that, pursuant to decree entered at the April, 1898, term, he will sell on October 17, 1898, the following real estate, to wit, "All that 20,000 acres of land not overlapped by what is known as the DeWit Clinton survey, situate in what was known as Triadelphia District, Logan County, West Virginia, but now Triadelphia, Logan County, and Stafford District and Magnolia District, Mingo County, West Virginia, which said 20,000 acres was forfeited to the State for the non-payment of taxes due thereon for the year 1893, in the name of Alvin Irwin et al. About 1,000 acres of said 20,000 acres is overlapped by said DeWit Clinton survey. Said 20,000 acres is known as the Jesse R. Irwin land."

(M) Report of commissioner of school lands, reporting that after giving sale in the manner directed by the decree of April, 1898, said commissioner, on the 18th day of October, 1898, at the front door of the court house, sold "the following real estate in the bill an dproceedings in said cause mentioned, to wit, being all the estate in the bill and

proceedings mentioned and described, situate, lying and being in Triadelphia District in this county and Stafford District, Mingo County, West Virginia, except that portion of said real estate if any, included in the DeWit Clinton survey, and all timber standing and being on said lands formerly sold to and branded by Little Kanawha Lumber Company;" at which sale W. H. Stoddard and Amos C. Hall became the purchasers for \$3,000.00.

(N) Decree of said circuit court, entered November 3, 1898, filing the report of the sale of "the land in the bill and proceedings mentioned," "except such parts thereof, if any, as may be included in the DeWit Clinton survey," and timber sold to Little Kanawha Lumber Company, and lands "protected under the Constitution and laws of this State," to W. H. Stoddard and Amos C. Hall for \$3,000, and payment of that sum by a thirty day sight draft, and the want of any exceptions to said report, and the approving and confirmation of said sale; directs that upon the payment of said purchase money, J. B. Wilkinson, who is appointed special commissioner for the purpose, make, acknowledge and deliver to the purchasers "a proper and apt deed" to the real estate sold therein to said purchasers, said commissioner, in making said deed, to be "guided in making the same according to the exceptions as to the lands and timber above mentioned."

It was error to admit said transcript in evidence, because the same was incompetent and immaterial, the bill in said cause not describing or identifying, or furnishing the means of identifying any land, and not being sufficient as a basis for the proceedings had thereon; and because these defendants were not parties to said suit, and permitting said decrees and proceedings to be used in evidence against them and be made a basis for the recovery of the land claimed by said defendants deprived them of their said property, through and by the instrumentality of the State of West Virginia, without due process of law and in contravention of section 1 of Article 14 of the Amendments of the Constitution of the United States, and the giving of such effect by this court and making said proceedings effective or instrumental in recovering from these defendants the land claimed by them also deprived these defendants of their property without due process of law in con-

travention of Article 5 of the Amendments of the Constitution of the United States; and because said proceedings were further immaterial for the reason that it does not appear to affect or relate to the land in controversy in this cause.

THIRD. The said court erred in admitting in evidence the deed from J. B. Wilkinson, special commissioner, to W. H. Stoddard and Amos C. Hall, dated November 12, 1898, reciting a sale by Joseph W. Hinchman, commissioner of school lands, in pursuance of the decree of the circuit court of Logan County, entered on the 29th day of April, 1898, in *State vs. Irwin et als.*, of "the real estate hereinafter mentioned and conveyed," to said Stoddard and Hall for \$3,000, "the real estate so sold and purchased as aforesaid being all that portion of a 480,000 acre survey situated in the counties of Logan and Mingo, which said 480,000 acre survey was conveyed to Jesse R. Irwin from W. B. McClure, commissioner of school lands for the county of Wyoming, by deed dated March 25, 1886, now of record in the clerk's office of the county court of said Logan County in Deed Book I, pages 394 and 395;" the confirmation of said sale and the appointment of said Wilkinson commissioner to make said deed by decree of November 3, 1898; the exception from such sale, by said last mentioned decree, of "such parts, if any of the said real estate in the said counties of Logan and Mingo as may be included in the DeWit Clinton survey" and timber sold to Little Kanawha Lumber Company, and lands within the exterior boundaries of the grant, title whereto is protected under the Constitution and laws of the State of West Virginia, the said special commissioner to be guided by said exceptions in making said deed; and purporting to grant to said Stoddard and Hall "all that portion of the said 480,000 acre survey, situated, lying and being in the said counties of Logan and Mingo, subject to the exceptions mentioned in said last decree as to the timbers and lands therein expressly mentioned," and purporting to give the boundaries of said 480,000 acres as described in said deed from McClure, "supposed to contain 20,000 acres, more or less, of the lands hereby conveyed," and providing that no portion of said 480,000 acre survey, outside of the counties of Logan and Mingo, is intended to be conveyed, and the con-

veyance of the portion within said counties is subject to the exceptions contained in the said decree of confirmation of sale. There were no pleadings, decrees or evidence in said cause of State vs. Irwin upon which to base the said deed, no such land being therein described, and the land purporting to be sold or conveyed not appearing to embrace the land in controversy in this suit, and the said deed is irrelevant and immaterial to any issue in this cause, and incompetent as evidence against defendants.

FOURTH. The Court erred in admitting in evidence, over the objection of defendants, the partial record of the chancery cause of State of West Virginia vs. Henry C. King et als. from the circuit courts of Wyoming, Logan, Cabell and Marion counties, set out in Exception No. 5 of said bill of exceptions and consisting of

(A) The amended bill of the State against Henry C. King and sundry others (including none of these defendants), filed in Wyoming County, making a part thereof the original bill filed at May, 1894, rules, and prior amended bills, and seeking to sell, for the benefit of the school fund, the 500,000 acre grant to Robert Morris from the Commonwealth of Virginia June 23, 1795, and alleging that the said grant, after having been redeemed in 1883 by Robert E. Randall, trustee, the owner, by payment of all taxes up to and including that year and ever since then had been omitted from the land books and not charged with taxes on that part thereof situated in West Virginia, and that such part had become thereby forfeited to said State, and that the said grant overlapped a 480,000 acre tract in which Jesse R Irwin and other named defendants claim some interest.

(B) The petition of Alexander McClintock filed in Wyoming County, in which he claimed title to a tract of 142,000 acres, granted to DeWit Clinton February 19, 1796; alleged that it had become forfeited to the State and was liable to sale, that a suit for the purpose of selling the same was pending in Logan circuit court, in which he had filed a petition to redeem and in which suit King was endeavoring to redeem, as part of said Morris grant, a large part of the territory covered by said DeWit Clinton grant, that King had no title to said grant, and if he had, there were pending in said Logan circuit court, before said suit was

brought, two other suits in which King had filed petitions asking to redeem said land, and in which his right to redeem, if he had such right, could be exercised, and that petitioner is willing to redeem said Clinton grant. Petitioner denies jurisdiction of the court and prays that proceedings be stayed or confined to land in Wyoming County and outside said DeWit Cliton grant, or, if jurisdiction be entertained, that petitioner be permitted to redeem.

(C) Petition of Stoddard and Hall (filed in Cabell County, August 5, 1901) in which they set up claim to 20,000 acres as sold to them in State vs. Irwin, and conveyed by the deed from Wilkinson, commissioner, and allege that said King is asking to redeem the Morris 500,000 acre grant and claims that it overlaps and includes the greater portion of the said 20,000 acres, and that only a small portion of the latter lies in Logan County and none in Mingo County; that said 20,000 acres is a part of the 480,000 acres granted to Morris March 23, 1795, and is part of the same land sold by W. B. McClure, commissioner of school lands, to Jesse R. Irwin, July 15, 1885, in the school land suit of McClure, commissioner, vs. Irwin et als., and said 480,000 acre grant in Wyoming County and conveyed to Irwin by said commissioner March 25, 1886; that they claim all the Logan and Mingo County part of said 480,000 acres as surveyed by W. T. Sarver, except the land and timber excepted in said commissioner's deed; that after his said purchase, Irwin, in 1886, conveyed one-fourth of said land to Charles F. Thomas, one-fourth to Alvin Irwin and one-fourth to Harris Hoyt, who conveyed the same to Marie E. Hoyt, his wife, and said 20,000 acres was charged to said persons on the land books for Logan County, 5,000 acres to each; that they are informed and believe that Irwin and his associates took possession of said 20,000 acres and held the same and paid the taxes thereon until the same became forfeited, and that petitioners have been in possession thereof and paid taxes ever since November 3, 1898; that in 1889 U. B. Buskirk, commissioner of school lands for Wyoming County, instituted suits to sell portions of said land, claiming that such portions were not included in the Irwin purchase, and that Marie E. Hoyt brought suit in the United States Circuit court for the district of West Virginia against said commissioners, and a decree was en-

tered May 24, 1895, enjoining them from selling any more of said land and from surveying the same and adjudging that the exterior boundaries of said 480,000 acre grant, as run by William T. Sarver, were the true boundaries thereof; that prior to said purchase of said 20,000 acres in November, 1898, petitioners were "the owners by purchase and conveyance of all the interests of said Emma I. Pomeroy, Marie E. Hoyt, and Jesse R. Irwin in said 480,000 acres in West Virginia, and are advised that by virtue of such purchase they are now the owners of the equity of redemption of the said Pomeroy, Hoyt and Irwin of all that portion of said 480,000 acres overlapped by the DeWit Clinton 142,000 acres, and that as such owners they have filed a petition in the aforesaid suit of State of West Virginia vs. Jesse R. Irwin et als. in said Logan circuit court, asking to be permitted to redeem so much thereof as lies within said interlock," in which cause it had already been adjudged that the said Pomeroy, Hoyt and Irwin were the former owners of said land; that petitioners were not parties to this suit of State vs. King et als. at the time of the entry of the decree of September 30, 1897, decreeing redemption of said 500,000 acre grant by said King, nor were Pomeroy, Hoyt and Irwin parties to the appeal from said decree, and are not bound by the decree of the Supreme Court of Appeals therein; that the location of said 480,000 acre tract by the United States court is binding upon the State and all parties, and that the State has no right to bring said location into controversy, nor any right to sell said 20,000 acres nor proceed against the same, and King no right to redeem any of said land. They pray that so much of said suit that affects said 20,000 acres be dismissed.

(D) Amended petition of U. B. Buskirk, trustee, U. B. Buskirk, J. Cary Alderson, R. L. Shrewsbury, and W. R. Lillv against the State of West Virginia, Henry C. King, J. E. Toler, Kimberly Land Company, W. K. Cowden, trustee, G. A. Porter, Fred Gardner, J. L. Caldwell, Walter L. Ashby, Elson Crawford, Mrs T. J. Prichard, Maud J. McClintock, E. T. England, trustee, E. T. England, R. L. Joyce, trustee R. L. Joyce Rose Ellison J. B. Ellison, Helen M. Cunningham, Frank Lee Benedict, Charles K Crawford, Evelyn C. Clark, Helen Margaret Cunningham, J. Benedict

Cunningham, S. S. Altizer and Mae Mullins, being also their alleged answer to the plaintiff's several bills, and the answer and petition of Henry C. King, and to the answer of J. K. Cowden, trustee, and to the answer of R. L. Joyce, E. T. Egland and others asking to redeem certain lands, in which petitioners allege that they are the owners of a boundary of land containing 20,000 acres, more or less, (the same land described in the deed from Irwin and others to Emma I. Pomeroy, and mentioned in first assignment of errors) and attempt to trace title thereto through the alleged sale of part of the Morris 480,000 acre grant to Irwin by W. B. McClure, commissioner of school lands, and conveyance of same to him by deed of March 25, 1886, contending that said sale was made according to a survey of said grant by W. T. Sarver, and estimated by him of 20,000 acres thereof in Logan County, and through the conveyances of undivided interests therein to Hoyt, Thomas and Alvin Irwin, and the subsequent forfeitures and tax sales, the suit of State vs. Irwin and the sale to Stoddard and Hall and sundry mesne conveyances from them and from Emma I. Pomeroy down to U. B. Buskirk, trustee, October 23, 1906; alleging that the State is concluded by the alleged adjudication of the boundaries of said grant in a suit of Hoyt vs. Buskirk and McClure, commissioners of school lands, in the United States court in 1889, which is set forth in said petition; that in July, 1889, said King brought a suit in said United States court against Hinchman, commissioner of school lands, claiming title to said 500,000 acre grant, and securing an injunction to restrain the sale of said land in State vs. Irwin, but upon answer and issue joined, a decree was entered January, 1889, dissolving said injunction, and thereby adjudicating that the State had the right to sell the land that was sold in said suit; that the said bill of King and said injunction were filed in State vs. Irwin and King thereby became a party thereto, and is bound and concluded by the decree of sale therein. Petitioners further allege that they and those under whom they claim have held adverse possession of said land from 1887 down and acquired title thereby, and have paid all taxes thereon since 1889; that at the time of the sale in State vs. Irwin the 500,000 acre grant was forfeited and the title of the State passed to Stoddard and

Hall by said sale; that the Clinton 142,000 acres was also forfeited and is now owned by petitioners by reason of said sale and possession and payment of taxes; that the location of said 500,000 acres has been adjudicated and fixed according to a survey by one Maupin, and is binding upon King; that King has no right or title to any of the 500,000 acres embraced in said "Pomeroy deed" nor have the claimants of the DeWit Clinton grant any title to such land; that Mae Mullins has a dower interest in said 20,000 acres but what claim the other defendants to said petition have petitioners do not know. Petitioners pray that their petition may be treated as an answer to the several bills of complaint, the answer and petition of King, Cowden, trustee, Joyce, trustee, et als. and all other pleadings claiming said land, and that, because petitioners have good title to said land and the State no right to sell the same and no party a right to redeem the same, the said land be dismissed from the suit.

(E) Demurrer and answer of Henry C. King to the foregoing petition of Buskirk et als, demurring for want of legal sufficiency; denies that Buskirk and associates have any title whatever to the land claimed by them; denies that the sale by McClure, commissioner, to Irwin was made according to any survey by W. T. Sarver, or that any survey by Sarver had then been made or was ever made in that case, or was ever filed in Wyoming county, but avers that said sale and deed were made according to the original survey of said grant and the natural monuments therein mentioned, and do not include any of the land claimed by Buskirk et als., nor any land involved in this suit; avers that the adjudication of the boundaries of said 480,000 acres grant in the suit of Hoyt vs. Buskirk and McClure, commissioners, in the United States court, was procured by fraud and imposition, but was void, so far as the State was concerned, for want of jurisdiction or judicial power, and that King was not a party thereto; denies that anything was adjudged, in King vs. Hinchman in the United States court, concerning the right of the State, and King permitted said suit to be dismissed when he ascertained that the land sold was not situated within the 500,000 acre grant; denies that King ever became a party to State vs. Irwin et als., and avers that no land within the

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boundaries of the "Pomeroy deed" was sold or conveyed to Stoddard and Hall in that suit; denies that the 500,000 acre grant is or since the formation of the State of West Virginia has been forfeited for any cause, or that the boundaries thereof have been adjudicated except by the decree of September 30, 1897, and further avers that the 480,000 acre grant and part of the Morris 320,000 acre grant had come down by a regular chain of conveyance (which is set out) from Robert Morris to Michael Bouvier, trustee, in 1852, and by him were cut up into sundry tracts and partitioned among and conveyed to the persons thereto entitled, and said parcels were duly entered upon the land book, as the whole 480,000 acres had theretofore been, and all taxes paid down to the present time, and neither the whole grant nor any part thereof had ever been forfeited; that said 480,000 acre grant had long ceased to exist as an integral tract, and was not owned by the State nor subject to sale in 1881 when said Jesse R. Irwin, claiming title to the whole grant under a deed forged in the name of said Bouvier 13 years after he had parted with title, instigated said McClure to institute said proceedings against him, said Irwin, for a sale of said grant upon a pretended forfeiture thereof for non entry upon the land book in the names of the heirs of Robert Morris who had parted with title eighty years theretofore, in order to secure a pretended title to said tract; that a sale of some of said land then belonging to Francis Lasher was made before the said sale to Irwin, and in a suit by Lasher against Irwin and others, the United States Circuit court and the Circuit Court of Appeals (*Cook v. Lasher*, 73 Fed. 701) declared the whole proceeding of McClure, commissioner vs. Irwin coram non judice and void; that said 500,000 acre tract and said 480,000 acre grant are contiguous and not overlapping tracts, surveyed for the same patentee by the same surveyor and having a common line forming the eastern boundary of the former and the western boundary of the latter, as was established by decrees entered in this cause of State vs. King et al. by degrees of Sept. 30, 1897, and Dec. 6, 1905, to which latter decree Buskirk and his associates were parties; that all taxes on said 500,000 acre grant had been paid and the same was not forfeited when the sale to Irwin was made and deed executed by Me-

Clure, and if by any construction said sale be held to overlap said 500,000 acres, such overlap was excepted as protected by the Constitution and laws and did not pass, nor did any color of title thereto pass, by said sale or deed and the pretended forfeiture of Irwin's pretended title to anything within said 500,000 acres; that notwithstanding all previous conveyances by Irwin, and the various tax sales and forfeitures of his pretended title to said 480,000 acres, or part thereof, he and the Hovts executed the deed to Pomeroy pretending to convey 20,000 acres, more or less, after deducting all legal junior grants and school sales," by a boundary that lies chiefly or wholly outside of said 500,000, and said Pomeroy was charged with taxes on 20,000 acres in 1894, and Alvin Irwin and Marie Hoyt in 1893, with a like quantity, although none of them owned any land whatever in Logan county, and the futile performance of tax sales to the State thereof was had, and thereupon, pending this suit of State vs. King, the suit of State vs. Irwin was instituted and the sale to Stoddard and Hall made, the deed therefor following the description in the original grant, and not the "Pomeroy deed," and embracing no part of the 500,000 acre grant, and not including any of the land claimed by Buskirk et als. in said cause; that no sale was ever made according to said "Sarver survey," which runs across the 150,000 acre—300,000 acre—and 320,000 acre grants, called for in said Wilkinson deed as boundaries of said 480,000 grant, and was rejected by Commissioner Wilkinson in making said deed; that upon the injunction in King vs. Hinchman being brought to the attention of the said Logan circuit court, the attorney for King was cited before said court and committed to jail as for contempt in applying to said Federal court and securing said injunction, and was kept in jail until released and discharged therefrom upon a writ of habeas corpus from said Federal court, the sale being confirmed in the meantime without making King a party to said cause; that said sale did not include any of the 500,000 acres, and if it did, King, who was the owner thereof and had redeemed said land in 1897, was deprived of the same without due process of law; that all the claims of Buskirk et als, had arisen pending said suit of State vs. King et als. and were acquired from parties thereto and were subject to the adjudicated

rights of King therein; that he, said King, has had actual, etc. possession of said land, adversely to Buskirk et als., ever since 1894, and that Sec. 6, Chap. 105 of the Code as amended in 1905, and the forfeiture provisions of the State Constitution Contravene the Fourteenth Amendment.

(F) Decree entered Jan. 11, 1908, dismissing from the suit fifteen parcels of land in Logan county, aggregating 18,382.47 acres, claimed by Buskirk et als. in their petition, dismissing the State's bills and King's petitions and denying the right of the State to sell and of King to redeem any of said tracts, and sustaining the exceptions of Buskirk et als. to report of Commissioner John T. Graham so far as same conflicts with said decree.

It was error to admit any of said pleadings or proceedings in evidence, because they and each and all of them were irrelevant and immaterial to any issue between plaintiffs and these defendants, and they and all the allegations, recitals and denials and any adjudications therein were incompetent as evidence against these defendants, and insufficient as any basis for any recovery against them: none of the parties to this action derived any title or right to any land from or under said proceeding or said suit of State vs. King et als. in which the pleadings were filed and decree entered, and the same form no link in plaintiffs' chain of title; these defendants claim no title under King, nor under Buskirk or his associates, nor under the State after the institution of said suit; none of these defendants was a party or privy to Buskirk's petition or to any of said proceedings, but all were strangers thereto, and had no opportunity to contest therein any of the claims or contentions of Buskirk and his associates, under whom plaintiffs claim, or of any other party to said suit, and the said decree and proceedings, given effect by this court as a conclusive adjudication against these defendants, deprive them of property, by the State of West Virginia, without due process of law and in contravention of Section 1, Article XIV of the Amendments of the Constitution of the United States; and the giving, by this court, of effect to said decree and proceedings as a binding adjudication in favor of plaintiffs and against these defendants and making the same any basis for recovering from these defendants the land in controversy deprived these defendants of property without

due process of law in contravention of Article V of the Amendments of said Constitution.

FIFTH. That said court erred in admitting in evidence, over the objection of these defendants, copies of the pleadings, proceedings and decrees in the circuit court for Logan county in the chancery cause of State of West Virginia vs. Alexander McClintock et als., consisting of

(A) Bill, filed at July, 1893, rules, against the unknown heirs of DeWit Clinton and various other persons, (not including these defendants), the purpose of which suit was to sell such parts of the DeWit Clinton 142,000 acre grant within said Logan county as were subject to sale, alleging that the commissioner of school lands had filed his annual report of forfeited lands in which he reported that there had been reported to him by the county surveyor 22 parcels of land situate mainly on Buffalo creek, each and all of which were parts of the 142,000 acres granted by Virginia to DeWit Clinton, February 19, 1896; that a large part of said grant overlapped a grant of 84,000 acres made to John Green in 1796, which tracts had been forfeited to Virginia long before the formation of the State of West Virginia; that the portion of said land so forfeited, situated in Logan county, had never been redeemed or released from forfeiture, but part thereof had been otherwise disposed of by junior grants and by sales by the commissioner of school lands, but the said 22 tracts were the absolute property of the State and subject to sale for the benefit of the school fund, as were also other large parcels which had not yet been surveyed out; that the plaintiff is not informed who was the owner of said 142,000 acres at the time of forfeitures, but that one B. C. Bowman, claiming as a remote grantee from DeWit Clinton, claiming certain timber thereon, had conveyed the same to Alexander McClintock, that Jesse R. Irwin, Alvin Irwin, Harris Hoyt, Marie E. Hoyt and C. F. Thomas claimed title to some of said land under an alleged deed from the commissioner of school lands of Wyoming county for the Robert Morris 480,000 acre grant, that John McClintock claims the timber on the right hand fork of Buffalo creek under a deed from James A. Brown, trustee, who claims under a deed from Jesse R. Irwin et als., and William C. Jones claims an interest under Alvin Irwin, and one John T. Willis appears to have a deed

from Jesse R. Irwin for the whole 480,000 acres dated Jan. 10, 1881, and Nathaniel R. Benson holds a mortgage on said 480,000 acres from Irwin, dated March 25, 1886, that John S. Cunningham and Helen Cunningham claim an interest in said 12,000 acres, which they had contracted to sell to defendants G. O. Chilton, James Malcom, T. C. Hall, M. P. Mullins, John B. Floyd U. B. Buskirk and John A. Shepherd, all of whom had sold their interest to Alexander McClintock; that said 480,000 acres does not overlap or in any way interfere with the 142,000 acres, but if it does the part thereof in Logan county is forfeited to the State by tax sales in 1886 and in 1888, and that all of the claims of title to said lands are forfeited and vested in the State; that Alexander McClintock and others, doing business as W. D. Fontain and Brothers, have cut a large quantity of timber from said land and all of them are insolvent, Prays an injunction to restrain the cutting and removing of timber and that the said 22 parcels of land and all other portions of said 142,000 acre grant that may be liable to sale for the benefit of the school fund be sold.

(B) Decree entered September 9, 1893, referring said cause to J. Cary Alderson, commissioner in chancery, to report what parts of said 142,000 acre tract are liable to sale, when and for what cause and in whose name said grant was forfeited, and any other pertinent matters.

(C) Order entered June 19, 1894, filing commissioner's report.

(D) Report of Commissioner Alderson in which he finds that portions of the 142,000 acres and 84,000 acres in Logan County were forfeited for non charging of taxes for five years after the year 1869; that a large part of said 142,000 acres is claimed by Irwin to lie within the 480,000 acre survey, but without passing upon that claim, he finds that the Irwin claim is forfeited; that he has been unable to find all the portions of said 142,000 acres that are liable to sale, but that the tracts reported by the county surveyor are so liable and said commissioner sets forth the taxes due thereon.

(E) Answer and petition of Alexander McClintock, filed June 19, 1894, alleges that he is the owned of the 142,000 acres by title regularly derived from DeWit Clinton,

and has title thereto superior to all other persons; that he is entitled to redeem said land and the whole thereof from forfeiture, and is entitled to the excess proceeds over and above the taxes, interest, and costs in the event of sale. Prays that he be permitted to redeem said land or receive such surplus.

(F) Decree entered June 20, 1894, confirming so much of the report of Commissioner Alderson as relates to five tracts of land therein referred to by number, and orders that U. B. Buskirk, commissioner of school lands, sell the said lands at public auction.

(G) Amended bill filed Oct. 18, 1896, in Marion county, making Robert Claypool, Roscoe Claypool, L. E. Browning, L. A. Browning, Harley Toler, Bruce Browning, Hiram Burgess, S. S. Altizer, J. L. Caldwell, Walter Ashby, Ellison Crawford G. A. Porter, Fred Gardner, Lee Joyce, E. T. England, J. B. Ellison, Milton Mullins, Mae Mullins and Mrs. T. J. Prichard defendants, alleging, in addition to matters set out in the original bill, that said cause was removed from Logan county to Kanawha and thence to Marion county; that after the filing of the original bill Henry C. King filed a petition in said cause and was made a defendant therein, and process was served in person or by publication on other defendants; that the Morris 500,000 acre grant extends across the 142,000 acre tract, leaving a portion of the later above and east of said Morris grant and a portion west thereof, the land so overlapped being in dispute as to the right of redemption, said King claiming the same and the successors of DeWit Clinton disputing said right and claiming the right to redeem under the said 142,000 acres; that a decree entered Dec. 5, 1905, in State vs. King and others settled and determined the boundary lines of the 500,000 acres, and the eastern line thereof lies across the watershed of the right and left forks of Buffalo creek farther down the creek, or westerly of the land formerly claimed by King; that the defendants named in the amended bill are claiming some interest in or right to redeem the DeWit Clinton 142,000 acres and the 22 parcels mentioned in the original bill and were made defendants in order that they may come in and assert their rights, if they have any, but the defendants Claypool, Browning, Toler and Burgess assert no title to the land but are cut-

ting timber without authority; that said 142,000 acre grant was never entered upon the land books of Logan county and no taxes have ever been paid thereon and the forfeiture thereof is not disputed and the plaintiff's title is absolute; and no person has any right of redemption thereof because the same was forfeited to the State of Virginia and not to the State of West Virginia, and the plaintiff is entitled to have said land sold. Prays for an injunction to restrain the cutting or removal of timber, that a receiver be appointed, that the timber be sold and the proceeds be brought into court, and that the prayer of the original bill be granted.

(H) Answer of Henry C. King to amended bill of complaint, denies that the Morris grant extends across the DeWit Clinton grant, or that any of the latter lies west of the former, and avers that said Clinton grant extends into and upon said Morris grant, which is older than and superior to the Clinton grant, and that said 22 parcels were never any part of said Clinton grant, the same having been granted to Morris as a part of said Morris grant; admits that no one has any right to redeem said DeWit Clinton grant and avers that said King has the right to redeem said 22 parcels of land, if the title thereto be forfeited; denies that by said decree of December 5, 1905, the boundary lines of said 500,000 acre grant, as between complainant and said King, have been settled, or that they have been settled in any manner except by the decree of the circuit court of Wyoming county entered Sept. 30, 1897, in State of West Virginia vs. King et als., and subsequently affirmed by the Supreme Court of Appeals; sets forth at length facts and reasons why said 500,000 acre grant is properly located by said decree of 1897, and why the State is estopped from reducing the same to a grant of 90,000 acres or less, as claimed by plaintiff, the said grant having been granted and paid for as 500,000 acres and taxed and taxes received by the State from Morris and his successors for many years as upon 500,000 acres; traces title from Morris down with payment of taxes to 1883, the entering of the decree of redemption in 1897 in State vs. King by which the boundaries of said grant were fixed as contended for by said King, the taxes due upon said land ascertained, the money therefor paid into court and said land declared to be re-

deemed, which money has ever since been retained by the State and converted to its own use, which decree upon appeal was only reversed as to the amount of taxes chargeable upon said land; avers that after said cause was remanded upon appeal a further amended bill was procured to be filed by sundry persons not then parties to said suit, and said cause was referred to John T. Graham, commissioner, who, upon inquiry as to the boundary of said land, reported the same substantially as found by said decree of September 30, 1897, after which the circuit court of Marion county entered said decree of 1905, attempting to establish a location entirely variant from that given by the circuit court of Wyoming county and affirmed by the Supreme Court of Appeals and reducing the said grant to a total of about 90,000 acres, which location and decree, so far as the complainant and defendant King were concerned, were entirely without pleadings, allegations and issue to support it and is null and void and not available to the complainant; that after the adoption of the Constitution of the State of West Virginia the owners of said Morris 500,000 acres had caused the same to be entered upon the land books and had paid the taxes thereon and discharged their duties thereon under said Constitution, and that the decree of redemption of 1883 charged the public officers, as did the statute, with entering said land upon the land books, and that it was the fault of the officers and agents of the State, and not of the owners of said land, that said land was not thereafter charged upon the land books, and that by reason thereof the State was estopped from claiming any forfeiture of said land, but, nevertheless, said King was willing to pay all proper taxes chargeable upon that portion of said Morris grant that was overlapped by said Clinton grant and redeem the name from the State's claim of forfeiture; that he, said King, has good and valid title to the said land, and the other parties to said suit had no title thereto, and prays that he be adjudged to have good title and be permitted to redeem said land and that the proceeds of the timber cut therefrom be applied upon the taxes.

(I) Decree of reference entered July 30, 1907, referring said cause to Robert Bland, commissioner in chancery, to report whether said 142,000 acre grant is forfeited, and, if so, when, and whether to Virginia or West Virginia;

what parts of said grant are liable to sale for the benefit of the school fund and the location and description of such parts, and the taxes and damages thereon; what parts, if any, are held under Section 3 of Article XIII of the Constitution; whether or not any portion has been sold in proper proceeding by the commissioner of school lands; who, if anyone, is entitled to redeem or receive the excess purchase money over the amount of taxes, interest and costs; what amount of timber has been cut from said land and what disposition has been made of the money derived from the sale thereof, and other matters deemed pertinent.

(J) Petition and answer of Buffalo Coal & Coke Company and Altizer Coal Land Company to the original and amended bills and the answer of Henry C. King. Alleges that said two corporations are the owners of all of the 22 tracts referred to in plaintiff's bill, and all of the DeWit Clinton grant within certain boundaries mentioned not included in junior patents, school land sales or protected by the Constitution and laws of West Virginia; that Buffalo Coal & Coke Company owns 8,481.73 acres of land between main Buffalo creek and Huff creek and described in a deed of June 8, 1907 from W. K. Cowden, trustee, and others to Buffalo Coal and Coke Company, 4,292 acres, and 40 acres on Muddy Rock House Branch, and a tract containing 4,140.73 acres, except 1,009.2 acres, being within and part of the 20,000 acres sold by the State to W. H. Stoddard and Amos C. Hall in State vs. Irwin, the parcels not within said 20,000 acres being set out by metes and bounds; that the Altizer Coal Land Company is the owner of a tract containing 2,698.85 acres, and a tract containing 137.4 acres described in said Cowden deed, and all said land(except certain described portions, being embraced in said Stoddard and Hall 20,000 acres; that said companies move the court to dismiss said suit as to all the land described in said Cowden deed, basing said motion upon the deed from Jesse R. Irwin and others to Emma I. Pomeroy, the alleged sale of said land to the State for taxes, the proceedings had in State of West Virginia vs. Irwin et als., which proceedings are set forth, the dismissal of said land in State of West Virginia vs. King et al., mesne conveyances from Stoddard and Hall to Buskirk, trustee, the affirmance of said decree of dismissal by the Supreme Court of Appeals of West

Virginia, to which court King appealed the same, and said petitioners "moved the court to dismiss the land embraced in said decree of January 11, 1908, from this suit on the ground of said adjudication, as well as upon the further ground that said land has been sold as school land and the taxes paid thereon since said sale and the sale so made validated by the legislature of West Virginia, passed at the regular session of 1905." Petitioners further say that they are successors in title to the parties in whose names the DeWit Clinton 142,000 acre grant was forfeited, setting out an alleged chain of title thereto; deny that said grant is not redeemable; deny that the decree of September 30, 1897, in State against King, is binding upon them, and deny "each and every allegation" in plaintiff's bill and in petition and answer of Henry C. King, inconsistent with the rights of said defendants. They pray that said suit be dismissed as to all the land within said 20,000 acres, and that they be permitted to redeem the land claimed by them within said 142,000 acres and outside of said 20,000.

(K) Report of Commissioner Bland, made Feb. 16, 1910, reporting that, after giving notice of the time when he would begin his duties under the decree of reference, he entered upon the discharge of his duties Oct. 7, 1907, from which time said reference was continued by him from month to month until Feb. 7, 1910, no person appearing before him prior thereto; that on Feb. 15, 1910, Buffalo Coal & Coke Company and Altizer Coal Land Company filed their petition and answer and exhibits and took the depositions of certain witnesses, and said commissioner finds that on May 10, 1894, Commissioner Alderson had reported that said tract of 142,000 acres was forfeited to West Virginia for nontaxation thereof for five successive years after 1869, which is the only evidence before said commissioner, and he finds the said grant so forfeited; that parcels No. 1, 2 and 3 claimed by Buffalo Coal & Coke Company and the parcels No. 1(2 and 3 claimed by Altizer Coal Land Company being parts of the said 22 parcels mentioned in the plaintiff's bill, are liable to sale for the benefit of the school fund, said parcels being of the following acreage, 998.4, 10.8, 257.5, 671.6, 1,057.93, 444.04, the amount of taxes and interest upon which said commissioner reports; that all the land embraced in said 22 par-

cels mentioned in the bill was sold by the commissioner of school lands to Stoddard and Hall and the deed from Cowden, trustee, to Buffalo Coal & Coke Company, dated June 8, 1907, and being all of the land described in Tract No. 1 of said deed, except said six parcels upon which taxes are reported; that all of Tract No. 4 described in said deed and 40 acres on Muddy Rockhouse Branch, except such as are embraced in said six parcels, were dismissed in State of West Virginie vs. King and others and are not liable to sale or redemption; that on March 26, 1901, D. F. Frazee, trustee, successor to McClintock, paid into court \$1,500, proceeds of timber cut on said land, to be credited upon taxes, and July, 1907, the special receiver herein sold timber cut from said land to the value of \$3,675.49, which was directed to be applied upon the taxes, and the commissioner make such application, reporting the balance of taxes payable; that Buffalo Coal & Coke Company and Altizer Coal Land Company are successors of DeWit Clinton and are entitled to redeem the above mentioned six parcels of land, or to receive the excess proceeds at sale thereof as successors of D. F. Frazee, trustee, and Alexander McClintock.

(L) Decree of Logan circuit court, entered May 4, 1910, confirming report of Commissioner Bland and reciting that it appears therefrom that all the land described in plaintiff's bill, except six parcels, is "not liable to sale on account of the adjudication made in the cause of the State of West Virginia vs. Henry C. King and others by the Supreme Court of Appeals of West Virginia, as well as upon the account of the sale thereof confirmed to Stoddard and Hall on the 3d day of November, 1898, "in State vs. Irwin, and dismisses "from this suit" all the land described in the deed from Cowden, trustee, to Buffalo Coal and Coke Company, dated June 8, 1907, except the six parcels not embraced in the suits above mentioned.

All said pleadings decrees and proceedings, were immaterial to any issue between plaintiffs and these defendants, and said records and the allegations and adjudications therein (if anything be adjudged therein) were incompetent as evidence against these defendants: the plaintiffs derived no right or title to any of the land in con-

troverſy herein from, by, through or under ſaid proceedings, and the ſame conſtitute no part of or link in plaintiffs' chain or claim of title; theſe defendants did not claim title from or under ſaid ſuits and were not parties and are not privies to any of ſaid ſuppoſed adjudications or to any of the pleadings of thoſe under whom plaintiffs claim, and were not called upon to conteſt, and had no notice or opportunity to conteſt, any of their allegations, claims or contentions, and if ſaid proceedings in ſaid State court bind and conclude or affect theſe defendants they deprive theſe defendants of property without due proceſs of law, in contravention of Section 1 of Article XIV, of the Amendments of the Conſtitution of the United States; and the giving by this court of ſuch effect to ſaid proceedings, as a baſis of recovery by plaintiffs of the lands held by the defendants, deprived the ſaid defendants of property without due proceſs of law, in contravention of Article V, of the Amendments of ſaid Conſtitution.

SIXTH. The court erred in overruling the motion of theſe defendants to ſtrike out, and in reſuſing to ſtrike out, plaintiffs' evidence; ſaid evidence did not tend to ſhow any title in plaintiffs to the land in controverſy, but, on the contrary, ſhowed want of title in Emma I. Pomeroy, and in plaintiffs, and an exception of the land in controverſy from the deed from Wilkinſon, commiſſioner, to Stoddard and Hall, the only one attempting to connect with the State, if that deed includes the ſaid land within its boundaries, which it does not. All ſaid evidence was improperly admitted, and ſhould have been ſtricken out and excluded for that reaſon.

SEVENTH. The court erred in reſuſing to permit the witneſs W. R. Lilly to answer and teſtify on behalf of theſe defendants what parties were preſent or repreſented by counſel in the proceedings before Chancery Commiſſioner Bland, in State vs. Alexander McClintock et als., or to teſtify upon any of the matters ſet forth in defendants' avowal (Exception No. 8) and in reſuſing to permit defendants to introduce any evidence in ſupport of the propoſitions ſet forth in ſaid avowal which avowal and matters which theſe defendants propoſed to prove were, in ſubſtance, that defendants would prove by ſaid witneſs that no counſel or perſon repreſenting the State

of West Virginia or Henry C. King, or representing any person or corporation, except said Buffalo Coal & Coke Company and Altizer Coal & Land Company, appeared before said Commissioner between the time of the filing of the answer of said corporations and the making and filing of his report by said commissioner; and that afterwards, and within a week or less, the regular Judge of said circuit court of Logan county, having called a special term for the purpose of some condemnation proceedings, left the town of Logan, and that the witness W. R. Lilly was elected special judge to preside at said special term, and after the proceedings for which said special term was called were concluded said Lilly vacated the bench and one C. H. Hudson was elected by the few members of the bar present to continue the proceedings at said special term; and thereupon the said Lilly and other counsel of said Buffalo Coal & Coke Co. and Altizer Coal & Land Co. presented to said Special Judge Hudson, in the absence of, and without the knowledge of, any other party to said suit or other counsel, the decree which has been offered in evidence in this case and marked "Plaintiff's Exhibit No. 23," which decree said Special Judge Hudson indorsed for entry and delivered to the clerk of said court, and that on the same or the following day and before said decree was spread upon the records of said court the said regular judge, J. B. Wilkinson, returned to Logan, and, being advised of the action herein indicated with reference to the presentation and indorsing of said decree, withdrew the same from the hands of the clerk and directed him not to enter the same of record until further action was had thereon, and said decree was not entered and had not been entered at the convening of said court at the next regular term thereof in April; that on the first day of said April term, Maynard F. Stiles, counsel for Henry C. King, appeared in court for the avowed purpose of taking action with reference to said commissioner's report, but that said matter was deferred by understanding of said counsel and some of the counsel for Buffalo Coal & Coke Co. and Altizer Coal & Land Co. and was to be taken up later in said term upon notice; that afterwards, on the 4th day of May, 1910, the said regular judge, J. B. Wilkinson, having vacated the bench because of interest in some matter to be heard before the said

court, a member of the bar of said court, then residing at Madison, in Boone County, was elected special judge, and thereupon the said decree, which had theretofore been indorsed by said Hudson and withheld from entry by the regular judge of said court as aforesaid, was presented to said special judge then holding said court, by counsel representing said Buffalo Coal & Coke Co. and Altizer Coal & Land Co., and in the absence of E. M. Showalter, counsel for the State, and in the absence of any counsel for the State of West Virginia or said Henry C. King or any other person except said two corporations, with the statement that the same was an uncontested matter, and the said decree was indorsed for entry, without any examination either of the report of said chancery commissioner or the evidence upon which the same was based, or of the decree itself; that the said counsel for said Henry C. King, arriving at Logan Court House that day, came into court the following morning, and, discovering that said decree had in the meantime and during the evening been spread upon the record, tendered and filed his affidavit, and the counsel for said corporations filed affidavits in opposition thereto, and thereupon the said King, by his said counsel, on the morning of the 5th day of May, 1910, moved the court, then being held by the said judge who had indorsed said decree, to vacate and set the same aside and allow said King to be heard in said cause for the reason that the said decree had been entered in the manner aforesaid, and upon a report of which said King or his counsel had no knowledge during the hearing or making of same and because of collusion in the procuring of said decree to be entered and because said special judge had, by his own confession, made no examination of said cause or of said decree, which said motion, being resisted by said Buffalo Coal and Coke Co., and said Altizer Coal & Land Co., was overruled by said special judge; that during none of the hearings or proceedings after the filing of the answer of said King in said cause in 1907, "Plaintiff's Exhibit No. 10," either before said commissioner or before said court was any person advised of said proceedings except Buffalo Coal & Coke Co. and Altizer Coal & Land Co. and their counsel.

The court having admitted said decree and the pleadings and report on which the same was based, as evidence and an adjudication binding upon these defendants, who were not parties thereto, it was error to deny to them the right to show that said decree and report were not entitled to any effect that might otherwise belong to them, because said report and decree were procure by fraud and collusion of the parties under whom plaintiffs claim and against the adverse parties to said proceedings.

EIGHTH. The court erred in withdrawing this cause from the jury and directing a verdict for the plaintiffs except as to the land enclosed by defendant Brown: there was no competent or legal evidence in the case tending to show any title in the plaintiffs, and such evidence as was admitted, relative to the location and boundaries of the deeds and grants upon which plaintiffs' claim of title was based, and the identity of the land therein conveyed with the land claimed by plaintiffs, was conflicting and susceptible of different inferences, findings or verdicts by different persons, but overwhelmingly preponderated in favor of the defendants, and said cause should have been submitted to the jury. In no event should there have been a verdict for more than an undivided one-half of said land.

NINTH. It was error to direct a verdict for the plaintiffs for any of the land claimed by defendant Brown, the undisputed evidence showing that he had held actual, open, visible, notorious, peaceable, continuous, exclusive and adverse possession of all the land claimed by him, for more than ten years before the institution of plaintiffs' action, whereby plaintiffs were barred of any recovery against said defendant.

TENTH. The court erred in rendering judgment against these defendants, said judgment being wholly dependent upon decrees and proceedings by which plaintiffs derived no title and to which these defendants were strangers and by which, by the effect given thereto by the court by said judgment, these defendants are deprived of their property without due process of law and in contravention of Article V, and Section 1 of Article XIV, of the Amendments of the Constitution of the United States.

ELEVENTH. The court erred in overruling the motion of these defendants to set aside the verdict directed and the judgment rendered against them and to grant them a new trial, and in refusing to grant such new trial.

TWELFTH. The court erred in other respects, matters and things appearing from the record of said cause.

And your petitioners say that this cause is one which involves the construction or application of the Constitution of the United States; wherefore they pray that a writ of error be awarded and issued to bring the judgment and order aforesaid and the record of this cause before the Supreme Court of the United States for review, and that said judgment and order be by the said Supreme Court reviewed and reversed. And your petitioners will ever pray, etc.

H. C. JONES,
H. C. JONES, Executor,
JAMES DOLLIVER BROWN,
I. P. BAER,
I. P. BAER, Trustee,
EDWIN L. HALL,
EDWIN L. HALL, Trustee,
BARBARA HALL,
JOHN W. HALL,
CORA S. HALL,
WILLIAM HADDINGTON,
NANCY HADDINGTON,
ELIZA H. KLECKER,
FRANCIS H. WALTER,
WILLIAM P. HALL,
ANNA HALL,
FRANK HALL,
GLADYS HALL,

By Counsel.

MAYNARD F. STILES,
I. P. BAER,
Of Counsel.

(Endorsed)

Filed Dec. 2nd, 1915.

EDWIN M. KEATLEY, Clerk.

WRIT OF ERROR.

United States of America, ss:

The President of the United States,

To the Honorable the Judges of the District Court of the
United States for the Southern District of West Vir-
ginia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Dist. Ct. U. S. for So. Dist. of W. Va. before you or some of you, between Buffalo Creek Coal & Coke Company, a corporation, plaintiff, against H. C. Jones, H. C. Jones, Executor, James Dolliver Brown, I. P. Baer, I. P. Baer, Trustee, Edwin L. Hall, Edwin L. Hall, Trustee, Barbara Hall, John W. Hall, Cora S. Hall, William Haddington, Nancy Haddington, Eliza H. Kleckner Francis H. Walter, William P. Hall, Anna Hall, Frank Hall and Gladys Hall, defendants a manifest error hath happened, to the great damage of the said H. C. Jones, H. C. Jones, Executor, James Dolliver Brown, I. P. Baer, I. P. Baer, I. P. Baer, Trustee, Edwin L. Hall, Edwin L. Hall, Trustee, Barbara Hall, John W. Hall, Cora S. Hall, William Haddington, Nancy Haddington, Eliza H. Kleckner, Francis H. Walter, William P. Hall, Anna Hall, Frank Hall and Gladys Hall, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein

to correct that error, what of right, and according to the laws and customs of the United States should be done.

(Seal) Witness the Honorable Benj. F. Keller,
Judge of the Dist. Court, United States,
So. Dist. of W. Va., the 29th day of March,
in the year of our Lord one thousand nine
hundred and sixteen.

EDWIN M. KEATLEY,
Clerk of the District Court of the United
States for the Southern District of
West Virginia.

Allowed by

BENJ F. KELLER,

Judge of the District Court of the United
States for the Southern Dist. of W. Va.

(Endorsed)

Filed Mar. 29th, 1916.

EDWIN M. KEATLEY, Clerk.

CITATION.

United States of America. SS:

To Buffalo Creek Coal & Coke Company, a corporation,
Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the District Court of the United States for the Southern District of West Virginia, at Charleston, wherein H. C. Jones, H. C. Jones, Executor, James Dolliver Brown I. P. Baer, I. P. Baer, Trustee, Edwin L. Hall, Edwin L. Hall, Trustee, Barbara Hall John W. Hall Cora S. Hall, William Haddington, Nancy Haddington, Eliza Kleckner, Francis H. Walter, William P. Hall, Anna Hall, Frank Hall and Gladys Hall, are plaintiffs in error and you are defendant in error to show cause if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Benj. F. Keller, Judge of the

Endorsed on Citation:

Service of the within writ on behalf of the Buffalo Creek Coal & Coke Company is hereby acknowledged this 18th April, 1916.

C. W. CAMPBELL,
Of Counsel.

ALLEGED BOND.

Know All Men by These Presents, That we, H. C. Jones, H. C. Jones, executor of the last will and testament of Hannah C. Jones, James Dolliver Brown, I. P. Baer, I. P. Baer, trustee, Edwin L. Hall, Edwin L. Hall, trustee, Barbara Hall, John W. Hall, Cora S. Hall, William Haddington, Nancy Haddington, Eliza H. Kleckner, Francis H. Walter, William P. Hall, Anna Hall, Frank Hall, and Gladys Hall, as principals, and W. I. Campbell surety, are held and firmly bound unto Buffalo Creek Coal & Coke Company, a corporation, in the full and just sum of Five Hundred dollars, to be paid to the said Buffalo Creek Coal & Coke Company, its certain attorneys, successors, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 18th day of April, in the year of our Lord one thousand nine hundred and sixteen.

Whereas, lately in the District Court of the United States for the Southern District of West Virginia, in a suit depending in said Court, between the said Buffalo Creek Coal & Coke Company, as plaintiff, and the said H. C. Jones and other above-named principals, as defendants, a judgment was rendered against the said defendants, and the said defendants having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit and a citation directed to the said Buffalo Creek Coal & Coke Company citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof;

Now, the Condition of the Above Obligation is Such, That if the said H. C. Jones and others, plaintiffs in said writ of error, shall prosecute said writ to effect, and answer all

costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

H. C. JONES, (Seal)
H. C. JONES, Executor (Seal)
EDWIN L. HALL, (Seal)
By MAYNARD F. STILES, Atty.
BARBARA HALL, (Seal)
By MAYNARD F. STILES, Atty.
CORR S. HALL, (Seal)
By MAYNARD F. STILES, Atty.
NANCY HADDINGTON, (Seal)
By MAYNARD F. STILES, Atty.
FRANCIS H. WALTER, (Seal)
By MAYNARD F. STILES, Atty.
ANNA HALL, (Seal)
By MAYNARD F. STILES, Atty.
GLADYS HALL, (Seal)
By MAYNARD F. STILES, Atty.
JAMES DOLLIVER BROWN, (Seal)
By I. P. BAER, Atty.
I. P. BAER, (Seal)
I. P. BAER, Trustee (Seal)
EDWIN L. HALL, Trustee, (Seal)
By MAYNARD F. STILES, Atty.
JOHN W. HALL, (Seal)
By MAYNARD F. STILES, Atty.
WILLIAM HADDINGTON, (Seal)
By MAYNARD F. STILES, Atty.
ELIZA H. KLECKNER, (Seal)
By MAYNARD F. STILES, Atty.
WILLIAM P. HALL, (Seal)
By MAYNARD F. STILES, Atty.
FRANK HALL, (Seal)
By MAYNARD F. STILES, Atty.
W. I. CAMPBELL, (Seal)

State of West Virginia, County of Logan.

The above named I. P. Baer & W. I. Campbell, Surety, being by me duly sworn, doth say that they are worth more than the sum of Five Hundred dollars, each over and above their just debts and liabilities, in property, situate in the State of West Virginia, and free from homestead and other exemptions.

Given under my hand and official seal this 18 day of April, 1916.

(Seal)

JNO. A. EVANS, Circuit Clerk.

Approved by

BENJ. F. KELLER,

Judge of the District Court of the United States
for the Southern District of West Virginia.

Apr. 25/1916.

(Endorsed)

District Court U. S. So. Dist. W. Va.

Filed this 25th day of April, 1916.

EDWIN M. KEATLEY, Clerk.

UNITED STATES OF AMERICA,

)

)SS.

SOUTHERN DISTRICT OF WEST VIRGINIA.)

I, Edwin M. Keatley, Clerk of the District Court of the United States for the Southern District of West Virginia, do hereby certify that the foregoing transcript, together with the four annexed maps, Plaintiffs' Exhibits No. 12, No. 29 and No. 30, and Defendants' Exhibit No. 3, which are referred to in and are a part of the defendants' bill of exceptions, is a true and complete copy of the record in the cause of Buffalo Creek Coal & Coke Company et als. vs. H. C. Jones et als., lately depending in said court, from the time said cause was transformed from a chancery proceeding to an action of ejectment, as the same is now on file and of record in my office.

In testimony whereof I have hereunto set my hand and the seal of said court, in Charleston, in said district, this 11th day of October, 1916, and in the 141st year of the Independence of the United States of America.

EDWIN M. KEATLEY,

(Seal of Court)

Clerk D. C. U. S., S. D. W. Va.

Office Supreme Court, U. S.

FILED

OCT 24 1917

JAMES D. MAHER;
CLERK.

ADDITIONAL BRIEF FOR PLAINTIFFS IN ERROR.

SUPREME COURT OF THE UNITED STATES.

OCTOBER, 1917, TERM.

No. 293.

H. C. JONES ET AL., PLAINTIFFS IN ERROR,

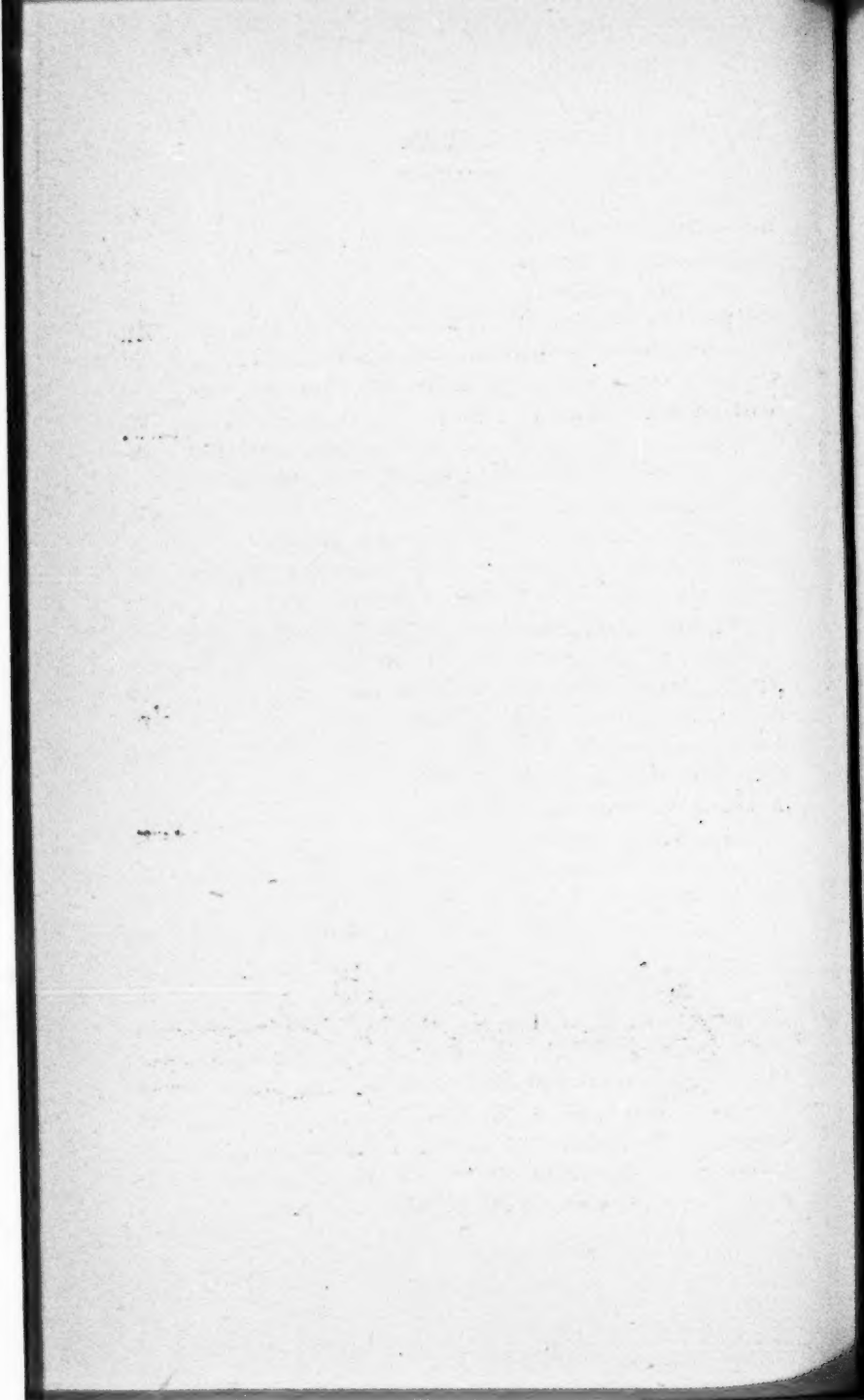
vs.

BUFFALO CREEK COAL & COKE COMPANY, De-
FENDANT IN ERROR.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.

Raymond L. Miles.

For Plaintiffs in Error.

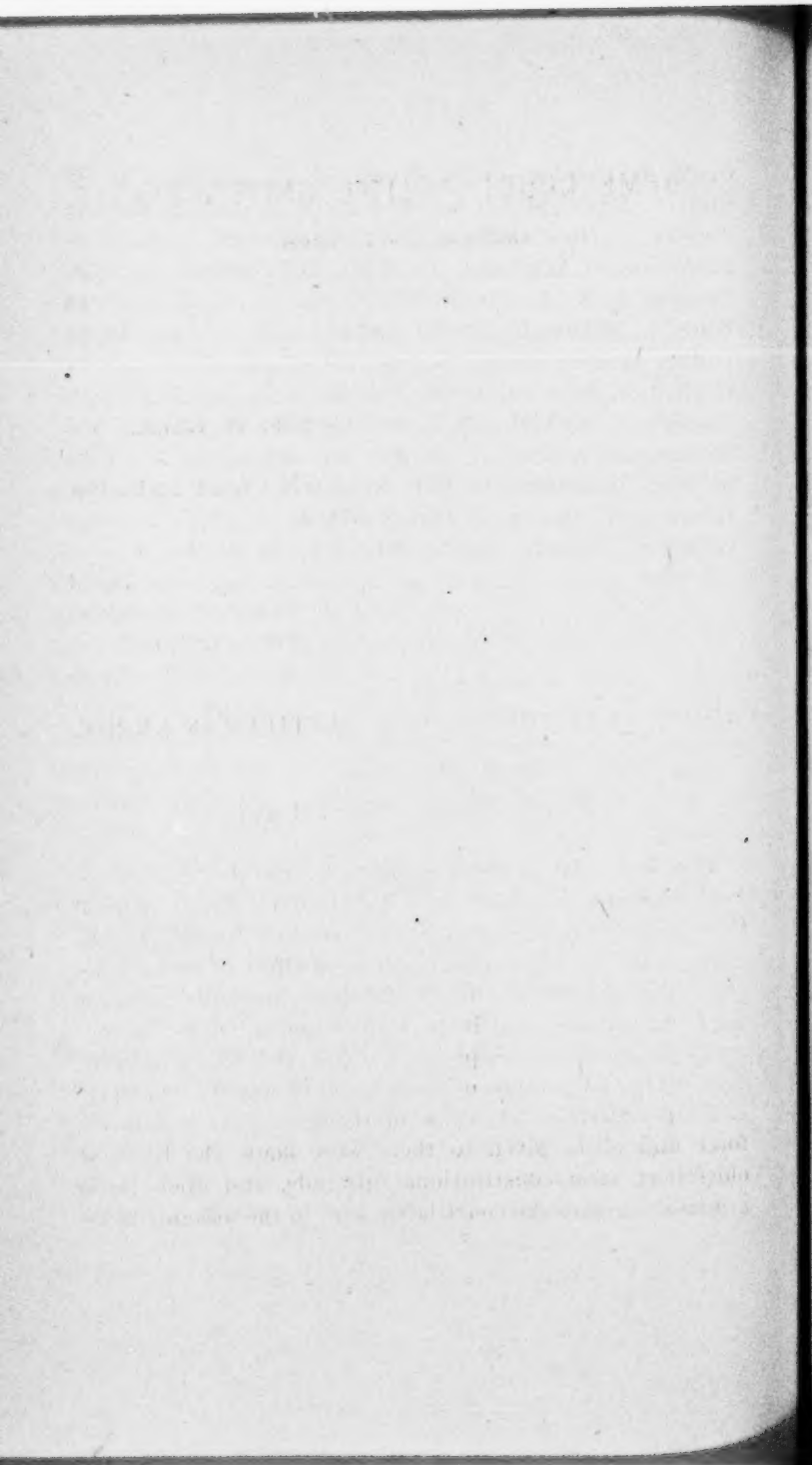


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SUPREME COURT OF THE UNITED STATES.

OCTOBER, 1917, TERM.

No. 293.

H. C. JONES ET AL., PLAINTIFFS IN ERROR,

vs.

BUFFALO CREEK COAL & COKE COMPANY, DE-
FENDANT IN ERROR.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.

ADDITIONAL BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

This is a writ of error brought by the defendants below to reverse a judgment of the District Court entered in an action of ejectment, upon a verdict directed by the court upon the supposedly conclusive effect of certain decrees and proceedings to which these plaintiffs in error were not parties or privies, offered and admitted in evidence on behalf of the plaintiff below, defendant in error here. The admission of said proceedings in evidence, and especially the use made of them, and the conclusive force and effect given to them were made the basis of objections upon constitutional grounds, and upon those grounds urged in the court below and in the assignment of

errors, the jurisdiction of this court was invoked. A motion to dismiss for want of jurisdiction, or to affirm, was made at the last term, and the brief filed on behalf of plaintiffs in error, in resistance of that motion, contains a statement of the case, to which the court is respectfully referred.

ASSIGNMENT OF ERRORS.

FIRST. The said court erred in admitting in evidence over the objection of defendants, the deed set out in the bill of exceptions, in First Exception (R. 38) dated July 28, 1893, and purporting to be a deed from Jesse R. Irwin, Harris Hoyt, Marie E. Hoyt, Alvin Irwin and Marie Irwin to Emma Idalia Pomeroy, purporting to grant to said Pomeroy "their right, title and interest in and to" the land therein mentioned, being a supposed 20,000 acres, more or less, in Logan County, West Virginia, and lying northeast of the Guyandotte River; because there was no evidence in the record that the pretended grantors in said deed had, and because they did not have, any right, title or interest in or to said land, and said deed was ineffectual to pass any title to or interest in said land to the said Pomeroy, and was incompetent and immaterial as evidence in said cause.

SECOND. The said court erred in admitting in evidence, over the objection of said defendants, the copy of the record of the chancery cause of State vs. Irwin et als., from the circuit court of West Virginia for the county of Logan for the sale of school lands, set out in defendants' Exception No. 2 in said bill of exceptions, beginning at page 40 of the record, and a summary of the substance of which is set out in the Assignment of Errors at page 270 *et seq.* of the record.

It was error to admit said transcript in evidence, because the same was incompetent and immaterial, the bill in said cause not describing or identifying, or furnishing the means of identifying, any land, and not being sufficient as a basis for the proceedings had thereon, and because these plaintiffs in error were not parties to said suit; and permitting said decrees and proceedings to be used in evidence against them and be made a basis for the recovery of the land claimed by them deprived them of their property, through and by the instrumentality of the State of West Virginia, without due process of law and in contravention of section 1 of Article 14 of the Amendments of the Constitution of the United States; and the giving of such effect by the District Court and making said proceedings effective or instrumental in recovering from these plaintiffs in error the land claimed by them also deprived them of their property without due process of law, in contravention of Article 5 of the Amendments of the Constitution of the United States; and because said proceedings were further immaterial for the reason that it does not appear to affect or relate to the land in controversy in this cause.

THIRD. The said court erred in admitting in evidence the deed from J. B. Wilkinson, Special Commissioner, to W. H. Stoddard and Amos C. Hall, dated November 12, 1896 (R-60), conveying to said Stoddard and Hall certain land therein described, purporting to lie in the counties of Logan and Mingo, West Virginia, and to be the land sold by Joseph W. Hinchman, Commissioner of School Lands, under a decree of the Circuit Court of Logan County, entered on the 29th day of April, 1898, in *State vs. Irwin et als.*, the lands so sold and conveyed purporting to be a portion of the 480,000 acre survey

conveyed by W. B. McClure, Commissioner of School Lands of Wyoming County, to Jesse R. Irwin, March 25, 1886. Said deed to Stoddard and Hall recites that the said sale to them was confirmed by a decree of said Logan Circuit Court entered November 3, 1898, which excepted from the lands sold "such parts, if any, of the said real estate in said counties of Logan and Mingo as may be included in the DeWit Clinton survey," and certain timber and other lands protected by the Constitution and laws of the State of West Virginia, the said decree appointing said Wilkinson commissioner to make said deed, and directing him to be guided in the making thereof by the provisions for reservations and exceptions aforesaid. There were no pleadings, decrees or evidence in said cause of *State v. Irwin* sufficient as a basis for such deed, no land being therein sufficiently described, and the land purporting to be sold or conveyed does not embrace the land in controversy in this suit, and said deed was irrelevant and immaterial to any issue in said cause and incompetent as evidence against the defendant.

FOURTH: The court erred in admitting in evidence the pleadings, decrees and proceedings from the chancery cause of *State of West Virginia v. Henry C. King et als.* from the Circuit Courts of Wyoming, Logan, Cabell and Marion Counties set out in exception No. 5 in said bill of exceptions, beginning at page 71 of the record, being a suit for the sale of school lands, and which was dismissed as to the land in controversy herein, and a full summary of the substance of which is set out in the assignment of errors in the record at page 277 *et seq.*

It was error to admit any of said pleadings or proceedings in said cause in evidence, because they and each and all of them were irrelevant and immaterial to any issue

between plaintiff and the defendants (these plaintiffs in error), and they and all the allegations, recitals and denials, and any adjudications therein were incompetent as evidence against the defendants, and insufficient as a basis for any recovery against them; none of the parties to this action derived any title or right to any land from or under said proceeding or said suit of State vs. King et als. in which the pleadings were filed and decree entered, and the same formed no link in plaintiffs' chain of title; the defendants claimed no title under King, or under Buskirk or his associates, or under the State after the institution of said suit; none of the defendants (plaintiffs in error) was a party or privy to Buskirk's petition or to any of said proceedings, but all were strangers thereto, and had no opportunity to contest therein any of the claims of Buskirk or his associates, under whom plaintiff claimed, or of any other party to said suit, and the said decree and proceedings, given effect as a conclusive adjudication against the defendants, deprived them of property, by the State of West Virginia, without due process of law and in contravention of Section 1, Article XIV of the Amendments of the Constitution of the United States; and the giving, by the District Court, of effect to said decree and proceedings as a binding adjudication in favor of plaintiff and against these plaintiffs in error and making the same any basis for recovering from them the land in controversy deprived these plaintiffs in error of property without due process of law, in contravention of Article V of the Amendments of said Constitution.

FIFTH. That said court erred in admitting in evidence, over the objection of the defendants, copies of the pleadings, proceedings and decrees in the circuit court

for Logan county in the chancery cause of State of West Virginia vs. Alexander McClintock et als., for sale of school land, and which was dismissed as to the land in controversy, said copies beginning at page 144 of the record, and a summary of the substance of which is set out in the Assignment of Errors at page 285 *et seq.* of the record.

All said pleadings, decrees and proceedings were immaterial to any issue between plaintiff and these defendants (these plaintiffs in error), and said records and the allegations and adjudications therein (if anything be adjudged therein) were incompetent as evidence against the defendants; the plaintiff derived no right or title to any of the land in controversy herein from, by, through or under said proceedings, and the same constituted no part of or link in the plaintiff's chain or claim of title; the defendants did not claim title from or under said suits and were not parties and are not privies to any of said supposed adjudications or to any of the pleadings of those under whom plaintiff claimed, and were not called upon to contest, and had no notice or opportunity to contest, any of their allegations, claims or contentions, and if said proceedings in said State court bind and conclude or affect these plaintiffs in error they deprive them of property without due process of law, in contravention of Section 1 of Article XIV, of the Amendments of the Constitution of the United States; and the giving by the District Court of such effect to said proceedings, as a basis of recovery by plaintiff of the lands held by the defendants, deprived the said defendants (these plaintiffs in error) of property without due process of law, in contravention of Article V, of the Amendments of said Constitution.

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SIXTH. The court erred in overruling the motion of the defendants to strike out, and in refusing to strike out, plaintiff's evidence (R-233); said evidence did not tend to show any title in plaintiff to the land in controversy, but, on the contrary, showed want of title in Emma I. Pomeroy, and in plaintiff, and an exception of the land in controversy from the deed from Wilkinson, commissioner, to Stoddard and Hall, the only one attempting to connect with the State, if that deed includes the said land within its boundaries, which it does not. All said evidence was improperly admitted, and should have been stricken out and excluded for that reason.

SEVENTH. The court erred in refusing to permit the witness W. R. Lilly to answer and testify on behalf of the defendants what parties were present or represented by counsel in the proceedings before Chancery Commissioner Bland, in State vs. Alexander McClintock et als., or to testify upon any of the matters set forth in defendants' avowal (Exception No. 8, R. 252), and in refusing to permit defendants to introduce any evidence in support of the propositions set forth in said avowal, which avowal and matters which these defendants proposed to prove were, in substance, that defendants would prove by said witness that no counsel or person representing the State of West Virginia or Henry C. King, or representing any person or corporation, except said Buffalo Coal & Coke Company and Altizer Coal & Land Company, appeared before said Commissioner between the time of the filing of the answer of said corporations and the making and filing of his report by said Commissioner; and that afterwards, and within a week or less, the regular Judge of said circuit court of Logan county, having called a special term for the purpose of some condemnation pro-

ceedings, left the town of Logan, and that the witness W. R. Lilly was elected special judge to preside at said special term, and after the proceedings for which said special term was called were concluded said Lilly vacated the bench and one C. H. Hudson was elected by the few members of the bar present to continue the proceedings at said special term; and thereupon the said Lilly and other counsel of said Buffalo Coal & Coke Co. and Altizer Coal & Land Co. presented to said Special Judge Hudson, in the absence of, and without the knowledge of, any other party to said suit or other counsel, the decree which has been offered in evidence in this case and marked "Plaintiff's Exhibit No. 23," (R. 219), which decree said Special Judge Hudson indorsed for entry and delivered to the clerk of said court, and that on the same or the following day and before said decree was spread upon the records of said court the said regular judge, J. B. Wilkinson, returned to Logan, and, being advised of the action herein indicated with reference to the presentation and indorsing of said decree, withdrew the same from the hands of the clerk and directed him not to enter the same of record until further action was had thereon, and said decree was not entered and had not been entered at the convening of said court at the next regular term thereof in April; that on the first day of said April term, Maynard F. Stiles, counsel for Henry C. King, appeared in court for the avowed purpose of taking action with reference to said commissioner's report, but that said matter was deferred by understanding of said counsel and some of the counsel for Buffalo Coal & Coke Co. and Altizer Coal & Land Co. and was to be taken up later in said term upon notice; that afterwards, on the 4th day of May, 1910, the said regular judge, J. B. Wilkinson, having vacated the bench because of interest in some mat-

ter to be heard before the said court, a member of the bar of said court, then residing at Madison, in Boone County, was elected special judge, and thereupon the said decree, which had theretofore been indorsed by said Hudson and withheld from entry by the regular judge of said court as aforesaid, was presented to said special judge then holding said court, by counsel representing said Buffalo Coal & Coke Co. and Altizer Coal & Land Co., and in the absence of E. M. Showalter, counsel for the State, and in the absence of any counsel for the State of West Virginia or said Henry C. King or any other person except said two corporations, with the statement that the same was an uncontested matter, and the said decree was indorsed for entry, without any examination either of the report of said chancery commissioner or the evidence upon which the same was based, or of the decree itself; that the said counsel for said Henry C. King, arriving at Logan Court House that day, came into court the following morning, and, discovering that said decree had in the meantime and during the evening been spread upon the record, tendered and filed his affidavit, and the counsel for said corporations filed affidavits in opposition thereto, and thereupon the said King, by his said counsel, on the morning of the 5th day of May, 1910, moved the court, then being held by the said judge who had indorsed said decree, to vacate and set the same aside and allow said King to be heard in said cause for the reason that the said decree had been entered in the manner aforesaid, and upon a report of which said King or his counsel had no knowledge during the hearing or making of same and because of collusion in the procuring of said decree to be entered and because said special judge had, by his own confession, made no examination of said cause or of said decree, which said motion, being resisted by

said Buffalo Coal & Coke Co., and said Altizer Coal & Land Co., was overruled by said special judge; that during none of the hearings or proceedings after the filing of the answer of said King in said cause in 1907, "Plaintiff's Exhibit No. 10," either before said commissioner or before said court was any person advised of said proceedings except Buffalo Coal & Coke Co. and Altizer Coal & Land Co. and their counsel.

The court having admitted said decree and the pleadings and report on which the same was based, as evidence and an adjudication binding upon the defendants (these plaintiffs in error), who were not parties thereto, it was error to deny to them the right to show that said decree and report were not entitled to any effect that might otherwise belong to them, because said report and decree were procured by fraud and collusion of the parties under whom plaintiff claimed and against the adverse parties to said proceedings.

EIGHTH. The court erred in withdrawing this cause from the jury and directing a verdict for the plaintiff except as to the land enclosed by defendant Brown; there was no competent or legal evidence in the case tending to show any title in the plaintiff, and such evidence as was admitted, relative to the location and boundaries of the deeds and grants upon which plaintiff's claim of title was based, and the identity of the land therein conveyed with the land claimed by plaintiff, was conflicting and susceptible of different inferences, findings or verdicts by different persons, but overwhelmingly preponderated in favor of the defendants, and said cause should have been submitted to the jury. In no event should there have been a verdict for more than an undivided one-half of said land.

NINTH. It was error to direct a verdict for the plaintiff for any of the land claimed by defendant Brown, the undisputed evidence showing that he had held actual, open, visible, notorious, peaceable, continuous, exclusive and adverse possession of all the land claimed by him, for more than ten years before the institution of plaintiff's action, whereby plaintiff was barred of any recovery against said defendant.

TENTH. The court erred in rendering judgment against the defendants, said judgment being wholly dependent upon decrees and proceedings by which plaintiff derived no title and to which the defendants were strangers, and by which, by the effect given thereto by the court by said judgment, the defendants (these plaintiffs in error), are deprived of their property without due process of law, and in contravention of Article V, and Section 1 of Article XIV, of the Amendments of the Constitution of the United States.

ELEVENTH. The court erred in overruling the motion of these defendants to set aside the verdict directed and the judgment rendered against them and to grant them a new trial, and in refusing to grant such new trial.

TWELFTH. The court erred in other respects, matters and things appearing from the record of said cause.

POINTS AND AUTHORITIES UNDER THE ASSIGNMENT OF ERRORS.

UNDER FIRST ASSIGNMENT.

1. The "Pomeroy deed"—the deed from the Irwins and Hoyts to Mrs. Pomeroy—was immaterial and inadmissible. It gave her no title to the land in controversy,

a. Because the Irwins and Hoyts had no title thereto, nor any deed that embraced the land.

b. Because what title they ever had to any land whatever was forfeited long before the Pomeroy deed was executed and had not been redeemed.

2. Plaintiff never derived any title from Mrs. Pomeroy.

a. Because Mrs. Pomeroy never had any title.

b. Because such appearance of title as she ever had was forfeited, both before and after the deed to her, and was never redeemed nor sold.

UNDER SECOND ASSIGNMENT.

There is no description in the bill or elsewhere in the proceedings, in *State vs. Irwin*, to identify any land or justify any sale whatever, and the sale is void for want of authority and for patent ambiguity.

Beatty vs. Edgell, (W. Va.) 83 S. E. 903;

Crawford vs. Workman, 64 W. Va. 10, 61 S. E. 319;

Westfall vs. Cattrell, 24 W. Va. 763;

Blankenship vs. Spencer, 31 W. Va. 510;

Smith vs. Proctor, 51 S. E. 89;

McSwain vs. Ricketson, (Ga.) 58 S. E. 65;

Crawford vs. Verner, 50 S. E. 958;

Luttrell vs. Whitehead, (Ga.) 49 S. E. 691;
 Cathey vs. Buchanan L. Co., (N. C.) 56; S. E.
 580.

UNDER THE THIRD ASSIGNMENT.

The deed from Wilkinson, Special Commissioner, to Stoddard and Hall should not have been admitted in evidence,

a. Because of the insufficiency of the pleadings and proceedings to authorize its execution.

b. Because it obviously passed no title to the land in controversy.

UNDER FOURTH AND FIFTH ASSIGNMENTS.

Proceedings in State vs. King and State vs. McClintock were inadmissible,

1. The plaintiff derived no title or claim of title through or under said proceedings, hence those proceedings do not constitute any part of its chain of title.

2. The defendants (plaintiffs in error) do not claim under Buskirk and his associates or under any one under whom the plaintiff claims, nor under King, nor any one whom Buskirk named in his petition in State vs. King, nor under any one who was party to the petition of Buffalo Creek Coal & Coke Company, filed in State vs. McClintock, and were not parties and are not privies to said proceedings, and are not bound by anything adjudged or done therein: *Judgments and decrees estop only parties and privies.*

Litchfield vs. Goodnow, 123 U. S. 549;

Stryker vs. Goodnow, 123 U. S. 527;

Harris vs. Platt, 21 Ala. 629;

Bill vs. Pratt, 5 Conn. 127;
 Simpson vs. Pearson, 31 Ind. 1;
 Edwards vs. McCurdy, 13 Ill. 196;
 Chandlers Appeal, 100 Pa. St. 262;
 Willard vs. Sutton, 43 Cal. 65;
 Walker vs. Perriman, 23 Ga. 309;
 Bass vs. Levier, 58 Tex. 567;
 Reed vs. Allen, 56 Tex. 182;
 Gerrish vs. Bragg, 55 Va. 329;
 Winston vs. Starke, 12 Bratt. 317;
 Blake vs. O'Neal, 63 W. Va. 483;
 Preston vs. Bennett, 67 W. Va. 392, 68 S. E.
 45;
 Gaul vs. Gaul, 50 W. Va. 533;
 Ralphsnyder vs. Titus, 63 W. Va. 469, 471; 60
 S. E. 494-5;
 McCoy vs. McCoy, 29 W. Va. 794;
 Priest vs. Las Vegas, 232 U. S. 604;
 Collins vs. Reger, (W. Va.) 57 S. E. 743-747.
 Wilson vs. Phoenix Powder Co., 40 W. Va. 419;
 Chilton vs. White, 72 W. Va. 545;
 XXIV Am. & Eng. Enc. of Law, 732.

3. The decrees and proceedings in *State vs. King* and *State vs. McClintock* were inadmissible, irrespective of the want of privity therewith on the part of the defendants,

a. Because the form of action was not the same as that in which the decrees were rendered, nor were the parties the same, nothing was specifically adjudged by said decree and proceeding, and it cannot be told from the decrees what, if anything, was adjudged thereby, and no evidence was offered to show what was adjudged.

Windom vs. Stewart, 48 W. Va. 488;
 Mo. State Life Ins. Co. vs. Loveland, (Ga.) 58
 S. E. 93;
 Evans vs. Birge, 11 Ga. 265;
 Laing vs. Price, W. Va. 83 S. E. 497;
 Beatty vs. Edgell, W. Va. 83 S. E. 903;
 Halliday vs. Bank of Stewart County, (Ga.) 58
 S. E. 169;
 XXIV Am. & Eng. Enc. of Law, 773;
 De Sollar vs. Hanscome, 158 U. S. 216;
 Cromwell vs. County of Sac, 94 U. S. 351.

4. But if the decrees and proceedings in said causes were admissible, the effect to be given them was a question for the jury to determine in connection with all other evidence in the case, and the jury was privileged to find against whatever they thought to be determined by said decrees, and the court had no right to withdraw the question from the jury.

Brown vs. Cook, W. Va., 87 S. E. 454;
 Hudson vs. Iguano Land & Mining Co., 71 W.
 Va. 402, 76 S. E. 797.

5. Giving effect in this case to the said decrees and proceedings, as a conclusive adjudication in favor of the plaintiff and against the defendants herein, on the question of the rights between them, as the court did, as if the defendants had been parties to said suit, was making said proceedings operate against the defendants without notice and opportunity to be heard, and deprived them of their property, without notice and opportunity to be heard and without due process of law, in contravention to the Fifth and Fourteenth Amendments.

Hovey vs. Elliott, 167 U. S. 408, 417;
 Galpin vs. Page, 18 Wall, 350, 355-6;
 Thompson vs. Whitman, 18 Wall, 457-468;
 Windsor vs. McVeigh, 93 U. S. 274-277;
 Pennoyer vs. Neff, 95 U. S. 714-733;
Ex parte Terry, 128 U. S. 289-307;
 Scott vs. McNeal, 154 U. S. 34-36-38;
 Old Wayne Mut. Life Assn. vs. McDonough, 204
 U. S. 8-23;
 New Orleans Water Works Co. vs. New Orleans,
 164 U. S. 471-480;
 Fayerweather vs. Rich, 195 U. S. 276;
 King Tonopah Mng. Co. vs. Lynch, 232 Fed. 494;
 Twining vs. New Jersey, 211 U. S. 78-110.
 Saunders vs. Shaw, 37 Imp. Cit. Rep. 638.

UNDER SIXTH ASSIGNMENT.

The motion to strike out plaintiff's evidence should have been sustained, because it was improperly admitted, and did not tend to show any title in plaintiff.

UNDER SEVENTH ASSIGNMENT.

The court having admitted in evidence against the defendants the decree in *State vs. McClintock*, which was aimed in that case at the claims of King, should have permitted proof that the decree was collusively procured against him, defendants having had no opportunity to resist its rendition.

UNDER EIGHTH, NINTH, TENTH AND ELEVENTH ASSIGNMENTS.

There was nothing in the record to warrant the directing of the verdict for plaintiff,

a. The plaintiff had no title and introduced no competent evidence of title to the land in controversy, or evidence adjudicating title in it, or estopping defendants to dispute plaintiff's claim of title.

b. The Wilkinson deed, the only one under which the plaintiff attempted to connect with the State, or with any one having title, does not embrace the land in controversy; and no deed under which plaintiff claims, which embraces the land, connects with the State or with any one having title.

Whether the plaintiff had title depended upon the location of the Wilkinson deed, and what was the proper location of that deed, or of any other deed, and what land was included in it, or excepted from it, were questions for the jury. *Fentress vs. Pocahontas Hunting Club*, (Va.) 60 S. E. 633. At least there was no evidence to warrant the withdrawal of these questions from the jury, except to direct a verdict *for the defendants*.

d. The plaintiff did not even claim that the Pomeroy deed gave title, and the corner trees, adjoining tracts, and other boundaries called for in the Wilkinson deed and the 480,000 acre grant, part of which it undertakes to convey, and which are identical, were located, proved and established by evidence which was not contradicted, and the deed was shown *not to include the land in controversy*. The defendants were entitled to have the judgment of the jury upon the effect of these facts as against any supposed adjudication in the school land cases.

Brown vs. Cook, 87 S. E. 454;

Hudson vs. Iguano Land & Mining Co., 71 W.

Va. 402.

e. If the Wilkinson deed, or the sale upon which it was based, could be so located as to embrace the land in

controversy, that land was excepted from the sale, decree of confirmation, and deed, being within the DeWit Clinton survey, and the title did not pass.

Monesson Improvement Co. vs. Flynn Lumber Co., (W. Va.) 87 S. E. 495.

f. If the plaintiff had any title to the land in controversy, it was only to half of it, which it derived from Irwin, and was tenant in common with Baer, one of the defendants, and only entitled in any event to a verdict accordingly, the purchase from the State at tax sale or school land sale operating to the interest of all cotenants.

Cecil vs. Clark, 44 W. Va. 659;
 Blake vs. O'Neal, 63 W. Va. 483, 61 S. E. 410;
 Battin vs. Woods, 27 W. Va. 58;
 Williamson vs. Russell, 18 W. Va. 632;
 State vs. Eddy, 41 W. Va. 95, 23 S. E. 529;
 Cane vs. Brown, 34 S. E. 579-581;
 Cooley on Taxation, 964;
 Blackwell on Tax Titles, 566.

g. The question of the extent of the possession of defendant Brown should have been left to the jury. A fence or other enclosure is not indispensable to actual possession without paper title.

Wade vs. McDongle, 59 W. Va. 113, 52 S. E. 1026;
 Kennedy vs. Manness, (N. C.) 50 S. E. 450-1.

h. The plaintiff in ejectment must locate his title papers and show the land in controversy to be within his title, and must recover upon the strength of his own

title, and whether the defendant's title is good or bad is immaterial.

Wade vs. McDougle, 59 W. Va. 113.

ARGUMENT.

I shall add nothing here to the brief on the subject of jurisdiction, except incidentally, the discussion of the other questions in the case helping to make more clear the force of the constitutional question, and the error of the court below. That the claim, that the plaintiffs in error are deprived of their property by the decrees admitted in evidence and the use made of them, is made seriously and in good faith the court will readily perceive; and that is enough for jurisdiction, and unless the court sustains the proposition, that one may be lawfully disseized and ousted of his possession and ownership of land by the instrumentality and through the conclusive force of decrees that in terms adjudicate nothing, and were rendered in proceedings to which he was not a party and is not privy, and of which he had neither notice nor opportunity nor occasion to resist, the court will hold that the constitutional questions and objections not only were seriously made, but are legally sound.

If the court shall find that the decrees in *State vs. King* and *State vs. McClintock* are admissible and conclusive of the plaintiff's title and the identity of the lands, it will end the case by affirmance. If the court shall find that the said decrees are not admissible at all, or if admissible, are not conclusive of said questions, that will likewise end the case, for it should have gone to the jury, and the judgment must be reserved and the cause remanded. In either case the other questions presented by

the record become unimportant, except as they bear upon the circumstances in which the decrees aforesaid were admitted, and as they show that the evidence was such as required submission of the case to the jury.

PLAINTIFF IN ERROR DEPRIVED OF PROPERTY.

The plaintiff's declaration alleges, and the evidence shows, that the defendants (plaintiffs in error) were in actual possession of the land in controversy when they were sued. They were the *prima facie* owners of the land, for "actual possession, being an element of complete legal title to real estate, is *prima facie* evidence of title in the possessor." *Wilson vs. Phoenix Powder Company*, 40 W. Va. 413. If the plaintiffs in error be dispossessed under the judgment rendered against them, they will be "deprived of property"—by the decrees upon which the judgment is based and effect given them by the court. The judgment itself deprives them of title. *Wade vs. McDougle*, 59 W. Va. 113.

PLAINTIFF MUST RECOVER UPON THE STRENGTH OF HIS OWN TITLE.

This is a fundamental and universal principle of ejectment law. And he must locate his title papers so as to cover the land in dispute, and the fact that the defendant's land may not lie where he claims it to lie, or that his title is not good, is immaterial. *Wade vs. McDougle*, 59 W. Va. 113. Until the plaintiff has fully established that his title papers cover the land in controversy, and has proved legal title thereto, the defendant is not required to surrender possession or make showing of title in himself. This case, therefore, requires no consideration of the defendants' title.

PLAINTIFF'S SHOWING OF TITLE.

The plaintiff relied upon two deeds, one called "the Pomeroy deed," the deed from the Irwins and Hoyts to Emma I. Pomeroy (R. 38), the other the "Wilkinson deed," the deed from Commissioner Wilkinson to Stoddard and Hall (R. 60). The Pomeroy deed embraces the land in controversy within its exterior boundaries, but no attempt was made to show title in either the grantors or the grantees of this deed, and they had none. It was a "blue sky" deed. No evidence was introduced by the plaintiff to connect it with any person having title. Its only avowed purpose was to describe the land claimed by plaintiff.

The Wilkinson deed purports to emanate from the State but the land embraced within it and conveyed by it, when properly and legally located, does not include any of the land in controversy. The only title, claim or color of title shown to have been possessed by the Irwins and Hoyts was a deed from McClure, commissioner of school lands, to Irwin, made in 1886, embracing the same land described in the Wilkinson deed, and their claim of title is conceded to have been forfeited and never redeemed.

Relying upon the Pomeroy deed, the plaintiff felt a necessity for an effort to connect it with the State, and for that purpose introduced the record of *State vs. Irwin*, the only suit in which Pomeroy was named as a party, and the only one in which any sale was made under which the plaintiff claimed. But that proceeding did not eventuate in a sale or deed for the land in controversy. Plaintiff contended that it was the "Pomeroy land" that was sold, but nowhere in the record of that case is the Pomeroy deed or land described; the commissioner did

not advertise for sale, or sell, any "Pomeroy land," but sold land "forfeited in the name of Alvin Irwin et al." (Alvin Irwin and Marie Hoyt) "for the taxes of 1893, and known as the Irwin land" (R-55). Emma I. Pomeroy was not charged with any taxes in 1893, there being no such tract of land at that time; and the only deed that was issued in the case (the Wilkinson deed) does not refer to, or describe, the Pomeroy land, but declares that the land conveyed is the land that was sold by School Land Commissioner Hinchman, and that it is a part of the same land which was conveyed by Commissioner McClure to Irwin, and is a part of the grant of 480,000 acres to Robert Morris. A reference to the latter grant (R-233), the McClure deed (R-255), and the Wilkinson deed (R-60), will show that the boundaries in all three are identical, and have not a line or corner in common with the land described in the Pomeroy deed. The 480,000 acre grant and the McClure and Wilkinson deeds, as located by the existing marked corner trees and adjacent boundaries of older grants called for by them, proved by the uncontradicted testimony of Surveyor Sell, do not include the land in controversy, but leave it entirely outside. This will be perceived by referring to the annexed blue print map and the testimony of W. D. Sell (R-238 *et seq.*)

Sell had surveyed three of the common lines between the 480,000 acre grant and the 320,000 acre grant, which is older and bounds it, and was familiar with other lines of the grants. The beginning corner of the 320,000 acre grant (R-236) is called for as a corner by the 480,000 acres (R-235), and is also a corner of a 150,000 acre grant and other tracts. It is described as "five chestnut trees on the top of a ridge that divides the waters of

Tug Fork of Sandy Creek from the waters of Guyandotte, at a place that is frequently used as a crossing place from the mouth of Browns Creek on Tug River to Indian Creek, a branch of Guyandotte, and near the head of Browns Creek." This point is at EX at the right of the map, and there Sell found the stumps of five chestnuts in 1895, at the exact point called for. This is an old, recognized corner of four or five surveys. At DX, CX and A he found at each place some of the timber called for, standing and marked, and at A the timber was blocked, the annulations counted, and the age of the marks, which correspond with the lines of the 320,000 and 480,000 acres, corresponded with the age of the former survey. From the point A the next line of the 480,000 acres and of the Wilkinson and McClure deed calls extend N.6800 poles, and the 480,000 acres can extend no further west without overlapping the 320,000 acres and 150,000 acres, with which it calls to run and which bounds it. There is a contention that the land sold to Irwin by Commissioner McClure was sold according to a survey made by Sarver, which runs by courses and distances alone, disregarding natural monuments and adjacent boundaries. This is not true, no such survey having been made at the time. A comparison of the McClure deed and the grant of 480,000 acres to Morris will show, as already seen, that McClure followed the original survey, and not any survey by Sarver or other surveyor. Wilkinson pursued exactly the same method. He was a defendant in State vs. Irwin, as well as commissioner of the court to make the deed, and if it had been the "Pomeroy land" that had been sold, he would have said so, and would have followed the description of the Pomeroy deed, or have made some reference to it, instead

of declaring that the land sold was the land conveyed by the McClure deed and the 480,000 acre grant.

Questions of boundaries and identity of land, and whether certain land is embraced in certain deeds or papers having different descriptions, are usually especially questions for the jury. Upon the evidence in this case, the court might well have directed a verdict for the defendants, if so requested, upon the ground that there was no substantial evidence to show that the land claimed by plaintiff was embraced in the sale or deed to Stoddard and Hall, through which alone the plaintiff made any pretense of attempting to connect with the State. But conceding that by some possible theory of location that sale might embrace the land in controversy, it was at least a matter for the jury to determine, in view of the strong, if not conclusive, evidence to the contrary.

The weight and effect of the evidence against the plaintiff as to the land conveyed or sold in *State vs. Irwin* is so overwhelming that it makes perfectly plain that the court was governed, and must have been governed, in its action solely by the idea that the whole question of location and title had in some way been conclusively settled by the decrees in *State vs. King* or *State vs. McClintock*, for upon no other theory would there be any imaginable purpose in the introduction of the record of those cases.

EXCEPTIONS IN SALE AND DEED TO STODDARD AND HALL.

Another reason why it was manifest error to direct a verdict for the plaintiff, and another thing that shows how controlling the court regarded the supposed adjudications in *State vs. King* and *State vs. McClintock*, is the fact that the land in controversy was excepted from the sale and deed to Stoddard and Hall. The notice of

sale (R-55), report of sale (R-57), decree of confirmation (R-58), and deed (R-60), all excepted from the operation of the sale and conveyance such portions of the premises, if any, as lie within the DeWit Clinton survey. If the land proceeded against and sold interlocks with the DeWit Clinton to any extent, then so far no title passed to Stoddard and Hall, and none has passed to their successors in interest.

The Supreme Court of West Virginia states a very obvious principle, in *Monnessen Imp. Co. vs. Flynn Lumber Company*, W. Va. 87 S. E. 495:

“Where a decree directs a sale of real estate, and appoints a special commissioner to make sale, and in describing the land to be sold the decree excepts certain land, and the commissioner makes sale, and the court confirms the sale, and the decree of confirmation recites that the said lands are excepted from the sale, a purchaser from such commissioner acquires no title to the lands embraced in such exception.”

The DeWit Clinton 142,000 acre grant (R-222) is shown on the accompanying map, and the southern boundary for 12 or 13 miles is Peter Huffs Creek. The land in controversy has the same creek for its southern boundary, and it lies entirely within the DeWit Clinton survey. Stoddard and Hall, in their petition filed in *State vs. King* (R-84), did not claim to have acquired any title to anything within the DeWit Clinton, by their purchase in *State vs. Irwin*, but merely claimed a right of redemption by reason of some claim which they held prior to the institution of that suit—a right which neither they nor any one else ever exercised.

Aside from all other objections to plaintiff's title, this exception defeats it, and the action of the District Court can only be explained, and that court sought to justify it only, upon the theory that the whole question of title, irrespective of its merits, had been determined in *State vs. King* and *State vs. McClintock*. If the title to the land in controversy had actually been vested in the plaintiff, it would have been easy to show that fact by appropriate evidence of location, and resort to supposed adjudication would not be necessary—that resort is itself a confession that the title is not and cannot be shown.

THE DECREES IN *STATE VS. KING* AND *STATE VS. M'CLINTOCK*.

Decrees and proceedings in other cases may be introduced in evidence to show that a fact or right has been established by prior adjudication, or to constitute a link in a chain of title. In the former case there must be privity of both parties with the decree; in the latter there need not be.

The decrees and proceedings in *State vs. King* and *State vs. McClintock* do not constitute any link in the chain of plaintiff's title. Neither Stoddard and Hall nor Buskirk purchased or redeemed any land in *State vs. King*, nor did Buffalo Coal & Coke Company redeem or purchase any land in *State vs. McClintock*. Those parties went out of those cases *with the same title* and no more than they had *when they came in*. Their petitions were not filed *for the purpose of acquiring any title to land*, but upon the theory and with the claim that they *already had title*. They prayed that the State's bill and King's petition to redeem might be dismissed and the land claimed by them be dismissed from the suits, and it was done. (R. 133-142 and R. 220). These decrees and proceedings, then, must have been received in evidence upon

some other theory than that they constituted links in plaintiff's chain of title, or in any manner conferred title upon plaintiff's predecessors in claim. That theory was necessarily a theory of *res adjudicata*, and upon no such theory were they admissible.

There is nothing more elementary than the principle that only parties and privies, but not strangers, to a proceeding are bound thereby. It is amazing courts should have had so many occasions to declare this principle, as shown by the authorities hereinbefore, which are a few out of a multitude, and which it is not deemed necessary to refer to further.

NO PARTIES AS UNKNOWN OWNERS.

If it be suggested that the plaintiffs in error were parties to the school land suit under the general designation, "unknown owners," it is to be noted that they do not come under that description. It appears that they were in possession of the land claimed by them, and the records were open, and their interest could easily have been known. In *Preston vs. Bennett*, 67 W. Va. 398, 68 S. E. 45, it is said, in the syllabus:

"A claimant of land that is proceeded against as the state's land under chapter 105 of the Code, who is known or whose claim to the land can be ascertained by the use of reasonable diligence, should be made a party to the bill *eo nomine*, and, if a resident of the state, should be served with process."

To this the Court adds, in its opinion:

"And unless so made a party and served with process, or unless he comes into the

suit and is given an opportunity to litigate his claim, he is not bound by the decree of the court."

And it was further said:

"By the use of the words 'unknown claimants' the statute does not mean simply such persons, claimants, as may not happen to be known personally to the school commissioner at the time of filing his bill, but it meant such as are unknown to him, and cannot be ascertained by his reasonable diligence."

The same doctrine is upheld in *Priest vs. Las Vagas*, 232 U. S. 604.

In *State vs. King*, the land now claimed by the plaintiff, together with other land claimed by Buskirk, the remote grantor of plaintiff, was dismissed from the suit and the court below appears to have thought that because the decree dismissing the plaintiff's suit bound the State, as of course it does in a proper case, it bound everybody else. But this position is untenable.

Blake vs. O'Neal, 63 W. Va. 483, 495, 61 S. E. 410-415, was a case in which a redemption decree was involved, and was urged as binding upon the opposite parties to the case in which it was offered. It seems that a sale for taxes to the State was void and the land had been off the land books for only four years, and hence there was no forfeiture, but the case had proceeded upon the theory of forfeiture and title in the State. After answering certain other objections, the court says:

"Moreover, it does not appear that these plaintiffs were parties to the suit in which the redemption was made. As against the

state, the redemption may operate to pass the legal title to Blake, and, as against Blake, the adjudication of title in the state by forfeiture or purchase may be binding; but it is not binding upon the plaintiffs, for the reason that they were not parties thereto. They may still show that the state took nothing by her purchase, since the taxes were paid for the year for which the return of delinquency was made, and the land was not omitted from the landbooks for the requisite period of five years. These facts are disclosed by the record adduced in evidence to prove title in the state by purchase and forfeiture and relinquishment thereof to Blake and they break down his claim of title as against the plaintiffs, however good it may be as against the state."

DECREES IN STATE VS. KING, AND STATE VS. M'CLINTOCK
WERE INADMISSIBLE, IRRESPECTIVE OF THE QUESTION
OF PRIVACY.

Aside from the question of privity with the decrees referred to, those decrees and pleadings were inadmissible as evidence in this case, or at least were not a legitimate basis for any decision in plaintiff's favor. The character of the action at bar is not the same, nor in the remotest manner similar to the cases in which the decrees were rendered, the parties not the same, nor the subject matter the same. Furthermore, the decrees do not themselves in terms declare what matters were decided by the court nor what facts or rights adjudicated, and there is nothing in the record of those cases, or of this, from cover to cover, to show what was adjudicated. The pleadings leading up to the decrees performed no service except to show what matters were presented for consider-

ation and decision; they do not show, nor tend to show, what was decided, and no attempt was made to supply that defect. There were many matters set out in Buskirk's petition, each one of which he seems to have regarded sufficient to justify the action he sought, but upon what one of these, if any, the court based its dismissal of the bill or King's petition, does not appear, and cannot be even inferred. In such cases, under all the authorities, many of which are cited in the early part of this brief, the decrees do not constitute estoppel.

In *Missourit State Life Ins. Co. vs. Lovelace* (Ga.) 58 S. E. 93-95, the court, after stating the law as to *res adjudicata*, says:

"This is the rule. It is, however, carefully and strongly fenced. The judgment must relate to the same question, and must clearly decide it. If it came collaterally under consideration, or was only incidentally considered, there is no estoppel. And if the decision of the question is ascertained inferentially, by arguing from the judgment and decree and the pleadings in the case, there is equally no estoppel."

The decree in *State v. King* might conclude King as between him and Buskirk in an identical case, which can never arise, but if King had been a defendant, and the sole defendant, in this case, the decree would not have been a bar, without extrinsic evidence showing just what was decided. Nor even in that case, for

WHERE A DECREE IS OFFERED IN EVIDENCE, INSTEAD OF BEING
PLEADED, THE CASE IS FOR THE JURY.

In *Hudson v. Iguano Land & Mining Company*, 71 W.

Va., 402—76 S. E. 797-800, speaking of a decree in another case, the court says:

"Instead of pleading it, the party entitled to the benefit thereof may rely upon it as evidence, and the record then goes to the jury along with other evidence. In the former case, the record concludes the plaintiff without further evidence; but, in the latter, it merely goes to the jury as evidence and does not prevent the trial of the issue."

CONCLUSION.

It is respectfully submitted that this court has jurisdiction, and that the court below committed the numerous errors complained of, the fundamental one being the directing of a verdict for the plaintiff in reliance upon the decrees and proceedings aforesaid, which were held by the court to be conclusive of the question of title to the land in controversy, whereby these plaintiffs in error were deprived of their property without any opportunity to resist the entering of said decrees or to appeal from them, and without knowledge even that they were contemplated, and without opportunity to overcome their effect by evidence in this case. It is respectfully submitted that the judgment of the District Court should be reversed and the cause amended.

MAYNARD F. STILES,

For Plaintiffs in Error.

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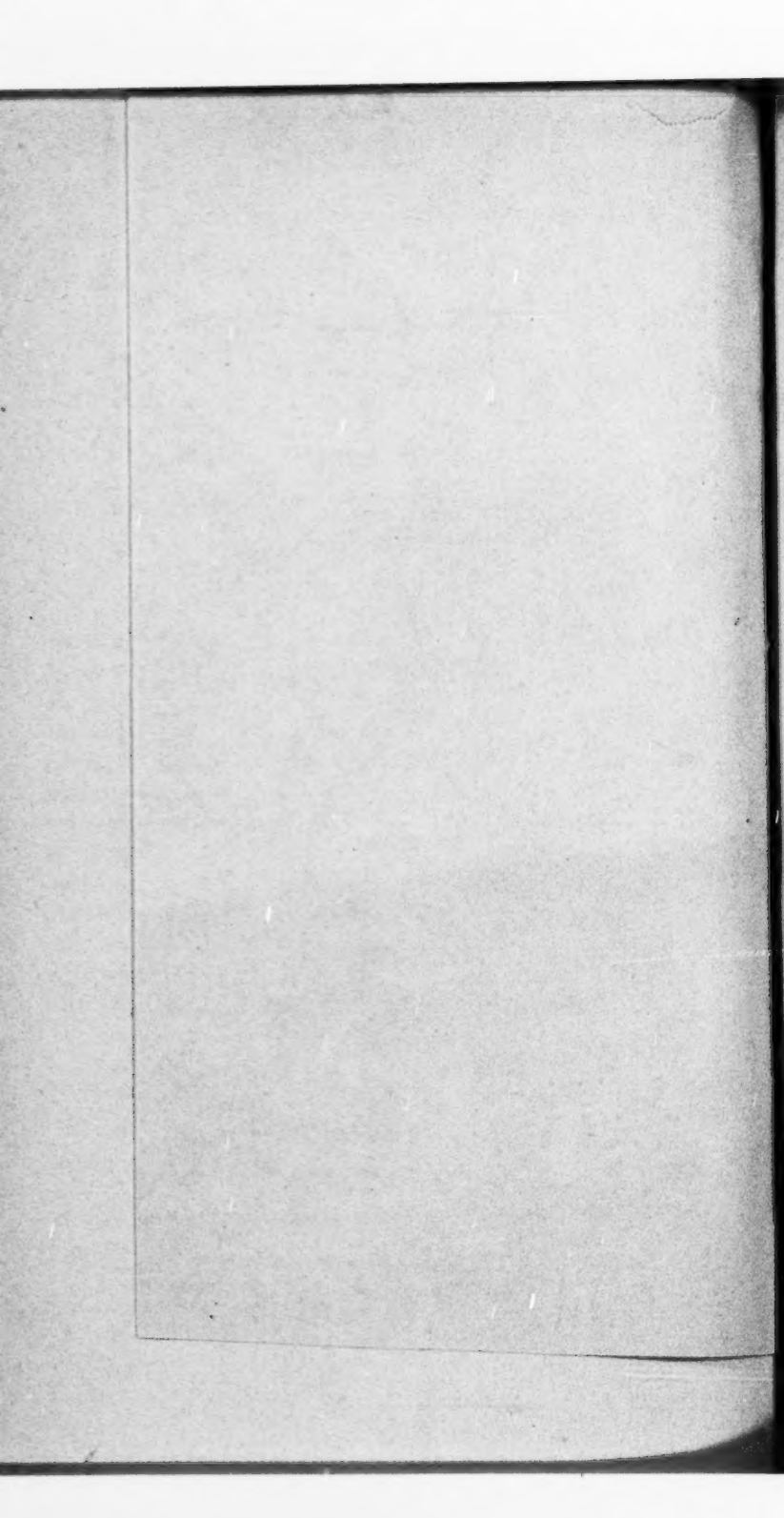


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IN THE
Supreme Court of the United States
OCTOBER TERM, 1917

No. 293

(No. 735 October Term, 1916)

H. C. JONES, EXECUTOR, et. al.,

Plaintiffs in Error

vs.

BUFFALO CREEK COAL & COKE
COMPANY,

Defendant in Error

Writ of Error to
the District Court
of the United
States for the
Southern District
of West Virginia,
at Huntington.

**SUPPLEMENTAL
BRIEF FOR DEFENDANT IN ERROR**

**ROBERT C. ALSTON,
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Atlanta, Ga.

Attorneys for Defendant in Error

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vs.

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Defendant in Error

No. 293

Supreme Court of
U. S., October
Term, 1917.
(No. 735 October
Term, 1916).

SUPPLEMENTAL BRIEF FOR THE DEFENDANT IN ERROR

Plaintiffs in error make no attack upon the constitutional validity of those parts of the Constitution of West Virginia, and of the laws of that State, which deal with the forfeiture and sale of lands on account of a non-return and non-payment of taxes.

They do make an attack upon the effect of those constitutional provisions and of those laws. See page eleven of brief filed May 21st.

The evident reason why no attack is made on these laws is that they have been repeatedly adjudicated to be constitutionally valid in that line of cases beginning

with *King v. Mullins*, 171 U. S., 404, and cited in the original brief filed for the defendant in error, and referred to in the brief filed for the plaintiffs in error.

While it is admitted that there are instances when a constitutional law may be so administered as to make an unconstitutional result, we respectfully submit that the laws under consideration here cannot be in and of themselves constitutional and the effect of their administration as here found unconstitutional, for the reason that the effect now under consideration is the normal result of their application.

The effect sought for them here is the same as it was in those cases in which they were held by this Court to be constitutional.

It is not as if these laws provided for a tax, and the tax was unequally distributed, or as if the laws provided for the making of rates, and the rates as made were unreasonable and unjust. In such instances the law may be valid, and its application invalid, but in the case where the effect complained of is the only effect which can be normally given to the law which has been declared to be constitutional, there can be no such separation.

NEITHER THE PLEADINGS NOR THE PROCEDURE OF THE PLAINTIFFS IN ERROR MAKE THE POINT NOW INSISTED UPON IN THE BRIEF.

The plaintiffs in error, who were the defendants below, pleaded not guilty to the plaintiff's complaint in the ejectment suit.

To sustain their case, they relied upon the following evidence:

1. A grant from the Commonwealth of Virginia to Wilson Cary Nicholas, dated the 23d day of March, 1795. This purported to grant 480,000 acres of land. Record, 234.
2. A grant from the Commonwealth of Virginia, dated the 4th day of March, 1795, to Wm. Cary Nicholas for 320,000 acres of land. In Record, page 326.
3. The evidence of W. D. Sell, Record, page 238, as to the location of the 320,000-acre tract and the 480,000-acre tract.
4. The evidence of James Doliver Brown, Record, 247, and of James Marion Vance, Record, 250, to show certain kind of possession in James Doliver Brown.

5. A deed dated the 25th day of March, 1886, between W. B. McClure, Commissioner of school lands for the County of Wyoming, and Jessie R. Irwin.
6. A deed dated the 25th day of March, 1886, between Jessie R. Irwin and Chas. F. Thomas.
7. A deed dated 21st day of August, 1886, between Jessie R. Irwin and Chas. F. Thomas.
8. A deed dated the 23d day of October, 1911, between C. F. Thomas and J. B. Ellison and I. P. Baer, Trustees.

This evidence puts the defendants in one of two positions, to-wit:

(A) That they did not undertake to attack the sufficiency of the grant from the State, made by the School Commissioner's deeds, under which the plaintiff below claims; or

(B) That having made that attack, and having been heard in the making thereof, they failed to sustain their position.

If the plaintiffs in error be placed in either one of these positions, they fail in their efforts against the con-

stitutionality of the effect of the tax laws of the State of West Virginia. They have had the hearing required by due process of law in any event.

THE RIGHT TO A JUDICIAL DETERMINATION OF THE ISSUE IS A SATISFACTION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

It is not necessary to the defendant in error's case to assert that the School Commissioner's deeds under which it claims and the proceedings out of which they grew are conclusive against any person not a party to those proceedings, or who are not in privity with a party to them.

The statutes and the decisions make these deeds at least *prima facie* evidence of title, which, of course, means that they are not conclusive evidence.

In the case at bar, if not before, the plaintiffs in error had the right to set up the invalidity of any one of the deeds or any one of the proceedings under which the defendant in error claimed the land in controversy, that is, they had the right to set up that the matter was out of the jurisdiction of the court, making the decree of sale and confirmation, and that the decrees of dismissal were void; the right to make the point that the law was unconstitutional; that the cause of forfeiture

did not exist, etc. See *Security Trust Company v. Lexington*, 203 U. S., 323-333.

This tax law, and the procedure thereunder, had the effect of changing the burden of proof, and to put the burden of proving the invalidity upon the defendants (plaintiffs in error). This violates no constitutional provision. See *Security Trust Company case*, supra, 334.

THE CONTENTIONS IN THIS CASE SIMPLY AMOUNT TO WHAT IS THE RULE OF EVIDENCE.

The plaintiffs in error relied upon possession to sustain their title. The defendant in error, who was the plaintiff below, relied upon the several adjudications set out in the record and in the original brief filed in this case, and in the agreed statement of facts. See Record beginning page 26, and especially item 7 at page 28.

The plaintiffs in error's final stand in their efforts to sustain their claim of title is possession, and the real question which they seek to make is:

Does the presumption of title which arises from possession outweigh the presumption of title which comes from the regular steps taken under the tax laws of the State of West Virginia, and from the decrees of

sale and the actual sales; the confirmation thereof; from the deeds made in pursuance thereof, and from the other proceedings in which this land was sought to be subjected, but out of which the land was dismissed because of the adjudicated superiority of the title now sought to be set up?

Out of this contention no constitutional question can arise, for the orderly procedure of litigation is in the power of the State in whose courts it is conducted, and it matters not what may be the rule of evidence, if it afforded the plaintiffs in error an opportunity to test the questions which in good faith they undertook to make.

**POSSESSION IS NOT TITLE; IT ONLY
CREATES A PRESUMPTION OF TITLE.**

To claim that possession is title is to assert that might is title.

Possession only raises that presumption of title which may be rebutted in the manner pointed out by the sovereign authority to which appeal is made.

"Title is presumed to be in the plaintiff when it is shown that he deraigned title under a patent from the Government."

15 Cyc., 128.

"Possession raises the presumption of title until the contrary is shown, but this presumption, of course, disappears if title is shown in another, and if plaintiff is shown to have the legal title, he is presumed to have the right of possession until a better right is shown."

15 Cyc., 128.

The proceedings in this case amounted to a grant from the State. See *Hector Coal Land Company v. Jones, et al.*—W. Va.—92 S. E., 102, copied page 58 of the original brief for the defendant in error in this cause, especially at page 68.

All title in this country is derived either from the Federal or a State Government, or from a foreign government formerly owning some part of the territory included in the United States. Title granted by such sovereign power bears down the presumption of title which comes from possession. Any other conclusion would, of course, make absolute chaos in the matter of land titles.

THE WEST VIRGINIA LAWS ON THIS SUBJECT WOULD BE CONSTITUTIONAL EVEN IF THE GRANT ORIGINATING IN THE SALE OF THE LAND BY THE SCHOOL COMMISSIONER HAD BEEN MADE CONCLUSIVE.

The subject-matter of this controversy is tax, and the method of enforcing tax sales. This Court had occasion to consider this idea in *King v. Mullins*, 171 U. S., 404-429. This case involved these present laws, except that the laws have been since amended, and in so far as they have been amended they have been strengthened.

The Court then said :

"Much of the argument on behalf of the plaintiff proceeds upon the erroneous theory that all the principles involved in due process of law as applied to proceedings strictly judicial in their nature apply equally to proceedings for the collection of public revenue by taxation. On the contrary, it is well settled that very summary remedies may be used in the collection of taxes that could not be applied in cases of a judicial character."

In *Fay v. Crozier*, 217 U. S., 455, and again dealing with this same law, the Court said:

"There is no greater objection under the Constitution of the United States to the forfeiture of land for five years' neglect to pay taxes than there is to a similar forfeiture by the statute of limitations for neglect to assert title against one by whom the former owner has been disseized. We think the question suggested is so plainly covered by the preceding cases, that the writ of error must be dismissed."

See also *Kentucky Union Company v. Kentucky*, 219 U. S., 140, 154.

A failure to return these lands by the plaintiffs in error and to pay the taxes and a consequent forfeiture was proved in this case. The procedure then had was in conformity with the statute. If one desired notice of that procedure, it was only necessary for him to cause his lands to be entered upon the land books, or assessed as showing some claim of ownership in the property. Then, in addition to that, publication was required by the statute, as in an *in rem* proceeding. So that, under the decisions concerning this identical method, the conveyances relied upon might very well have been made conclusive.

One's tenure of land is conditioned upon his paying the charges thereon assessed by way of taxes. A failure to pay the ordinary taxes is itself a notice that there will be an adverse result therefrom. It is a condition written into the tenure.

In order to have actual notice, one need only enter the land on the land book, so that the State could know to whom the notice should be given; a failure to get actual notice was the normal result of a failure to do that which would have put the State on notice of the claim of the plaintiffs in error; after that there was no way to give notice to them, except by publication and posting. That was done. The proceedings had that much of an action *in rem*.

"The evident purpose of Chapter 105 is to bring in and make parties to the suit all claimants to the land, or any part of it, which the State is seeking to sell, regardless of their source of title or the nature of their claims, and to require the conflicting claimants to litigate their respective claims with the State, and incidentally, among themselves, so that a final decree in such proceedings may be conclusive upon all parties, known and unknown, who claim title by any means whatsoever to all or any portion of the land proceeded against, and to create, as it were, by such a proceeding, a title in the pur-

chaser at the sale a new title to the land as clear and as free from incumbrances as it was possible for the State to make by grant under the old patent laws of the State of Virginia to a tract of land then granted for the first time."

Preston v. Bennett, 67 W. Va., 392; 68 S. E., 45, 47.

"Such suit is in the nature of a proceeding against the land itself, and the sale thereunder, when completed, is *prima facie* evidence of the forfeiture of the land against all persons whomsoever."

Starr v. Sampelle, 55 W. Va., 442; 47 S. E., 255.

The plaintiffs in error, the defendants below, offered no evidence whatever that this land had been returned for taxation; that it had been entered upon the land books; that they paid taxes upon it, or that they had done anything else to put the State on notice that they were claimants of this land.

It was agreed that the land in controversy had not been assessed to the plaintiffs in error, the defendants below, except as shown in exhibit No. 5. See page 31 of the Record, item 10, and page 69 of the Record for exhibit No. 5.

That exhibit shows that neither of the plaintiffs in error had entered these lands upon the land books, and that only fourteen acres had been entered by James Doliver Brown. Those fourteen acres were awarded to Brown, and are no longer in controversy.

The plan of the laws of West Virginia contemplates a right to a judicial determination of the cause of forfeiture.

Webb v. Ritter, 60 W. Va., 193; 54 S. E., 484, 499.

But cause of forfeiture was admitted here in the admission that the lands had not been assessed to defendants. (R., 31.) There was no evidence in this cause or elsewhere that the the cause of forfeiture did not exist.

THE CLAIM OF TITLE OF THE PLAINTIFFS IN ERROR.

The plaintiffs in error introduced a deed from C. F. Thomas to J. B. Ellison and I. P. Baer, Trustees, dated the 23d of October, A. D., 1911. They evidently claim under this deed as *cestuis que trustent*.

Thomas had been party to more than one of the proceedings in which it had been adjudicated that he had no title to this land.

Thomas' deed contains the following recital:

"The party of the first part does not warrant the title. He only conveys such title as he has, without any liability on his part."

Record, page 266.

The recited consideration of that deed was \$200.00. This deed, therefore, did not purport to convey title to the land to the grantees therein. It only purported to convey that title which Thomas had, and Thomas made no warranty, and in order to make it doubly sure that he was not warranting, expressly ~~and~~^{or} impliedly, he stipulated that the conveyance was made "without any liability on his part".

We submit that this was a recognition, both by Thomas and by his grantees, that he had no title.

It increases the importance of ascertaining whether or not Thomas had title, for if Thomas' claim of title to this property had been adjudicated adversely to him prior to the making of this deed, his deed was a nullity, for it conveyed nothing, and purported to convey nothing.

Of course, a claimant to title to land is bound by those things which affected the title in the possession of his grantor, or which affected those with whom he was in privity.

This deed is subject to that principle of law, but in addition thereto, it imports that principle into the case by its own terms in this, that it never undertook to convey more than the title Thomas had.

Chas. F. Thomas was made a party in the proceeding brought by the State of West Virginia against Jessie R. Irwin, et al. See page 40 of the Record. Acceptance of service in that case is shown at page 46 of the Record.

Not only was Thomas made a party, but so was Jessie R. Irwin. That service had been made upon Thomas was adjudicated at page 47 of the Record.

The proceeding resulted in a sale of the land in question to William H. Stoddard and Amos C. Hall. Thomas was next made a party to the fourth amended bill of complaint in State of West Virginia v. Henry C. King, et al. See Record, page 71.

This was brought against the 500,000-acre grant to Robert Morris. It was there alleged that Thomas, Irwin and others claimed title to this property because the 480,000-acre grant overlapped the 500,000-acre grant. See page 71-73 of the Record.

Alexander McClintock then filed a petition in this case, claiming to own the DeWitt Clinton grant of 142,000 acres of land. These lands were then dismissed out of this effort to subject them the second time.

Thomas and Irwin were both made parties, and the land claimed by the defendant in error in this cause was dismissed from the suit.

See page 135 of the Record. Thereby it was adjudged that title was in U. B. Buskirk, Trustee, who is an ancestor in title of the defendant in error.

Again, at page 144 of the Record, in the case of the State of West Virginia v. McClintock, et al., Irwin and Thomas were made parties defendant, and again it was adjudicated that the land be dismissed from the suit. See page 221 of the Record. So that, in at least the proceedings indicated, Chas. F. Thomas and Jessie I. Irwin, through whom the plaintiffs in error claim were parties defendant, and were duly served, and their title was duly adjudicated, and it was there held that they had no title to the property now in controversy.

All of these decrees were made prior to the time that Chas. F. Thomas undertook to convey this land to Ellison and Baer; so that, when Thomas undertook to convey, not the land in controversy, but "such title as he has, without any liability on his part" (page 266 Record), he in truth and in fact conveyed absolutely nothing, because in the proceedings mentioned, to which he was duly and regularly made a party, it had already been ascertained that he had no title.

The plaintiffs in error are in no position to raise any constitutional question, for, if for no other reason, an examination of their claim of title shows that they have no title, even if they were able to sustain the constitutional point made.

No point is made, or could be made, that a decree will not bind a person who is a party thereto. No point is made, or can be made, that Chas. F. Thomas was not a party to these cases. No point has been made, or can be made, that these decrees did not divest Thomas of his title.

The Record, page 266, shows that Thomas never purported to convey title to the land. He only purported to convey that title which was in him, if there was any in him, to this land. But that title having been adjudicated out of Thomas in proceedings into which he was a party by personal service, he had no title, and the plaintiffs in error, therefore, have no title which can be benefitted by the constitutional points which they undertake to make.

A JUDGMENT BINDS ALL PARTIES TO THE SUIT, AND THEIR PRIVIES.

"It is well settled that a judgment is conclusive, not only upon those who are actual parties to the litigation, but also upon all persons who are in privity with them."

See 2 Black Judgments, Second Edition, Section 549.

See *Bull v. Blackman*, 169 U. S., 243, 248.

"Privity is defined to be a mutual or successive relationship to the same rights of property."

See 2 Black Judgments, Section 549.

Privies who are bound by the judgment are those who acquire an interest in the subject-matter after the rendition of the judgment.

See 2 Black Judgments, Section 549.

A judgment rendered against the grantor in a conveyance of realty as defendant in an action involving the title thereto, will be conclusive upon his grantees taking after the suit.

See 2 Black Judgments, Section 549.

The plaintiffs in error claim in this case under two persons, to-wit: Irwin and Thomas, both of whom were

parties to the judgments adjudicating the title to be in the ancestors in title of the defendant in error, and they took from these grantors after the rendition of these judgments, and they are, therefore, clearly bound by the judgments.

This reduces the plaintiffs in error to one of the following two positions:

(a) They either claim under persons as to whom it has been adjudicated that they had no title, and this adjudication was made before the date of their conveyance; or,

(b) They claim by virtue of that presumption of title which comes from bare possession.

As to the first ground, it is quite clear that they are bound by the previous adjudications to the extent that those adjudications bound their ancestors, and those proceedings were wholly sufficient to bind them, and this appears to have been recognized by Thomas, the ancestor, for Thomas undertook to make a conveyance, not of the property, but only of such interest, if any, as remained in him.

The presumption which arises from possession is rebutted by the title from the State, derived as has been herein set out.

THE SEVENTH ASSIGNMENT OF ERROR BY THE PLAINTIFFS IN ERROR.

The seventh assignment of error is based upon the eighth exception. See Record, pages 293 and 252.

A witness was upon the stand, and an effort was apparently made to impeach the decree rendered on the 4th day of May, 1910, in the case of State of West Virginia v. Alexander McClintock. See Record, 219-222.

This decree had been offered as exhibit No. 23 of the plaintiff below, the defendant in error here. The question was asked this witness:

"What parties were present in person, or represented by counsel in this proceeding by the Commissioner?"

This was objected to as immaterial.

Counsel for the defendants, now plaintiffs in error, made an avowal as to what he expected to prove by the witness. See Record, page 253.

Apparently the purpose of this avowal was to show that there was a legal fraud committed which had the effect of vacating this judgment.

We submit that under the avowal as made, and treating the facts there avowed to have been proved, those facts were insufficient to establish the fraud, or in any way to set aside the judgment.

It appears that this judgment was entered on the 4th day of May, 1910, by a special Judge of the Court, the regular judge being disqualified.

Counsel for one of the defendants in said case, to-wit:

Henry C. King "came into court the following morning, and, discovering that said decree had in the meantime and during the evening been spread upon the Record, tendered and filed his affidavit, and the counsel for said corporation filed an affidavit in opposition thereto, and the said King, by his said counsel, on the morning of the 5th of May, 1910, moved the court, then being held by the said judge who had entered said decree, to vacate and set the same aside, and allow said King to be heard in said cause, for the reason that the said decree had been entered in the one aforesaid," etc., * * * * * "which said motion, being resisted by said Buffalo Coal & Coke Company and Altizer Coal & Land Company, was overruled by said judge".

This shows a discovery of the facts which are alleged to have constituted the fraud by counsel for Henry C. King, who was one of the defendants, and a motion to have that judgment set aside because of the alleged fraud.

The motion was heard and overruled. That means that the motion was adjudicated to be without merit. In other words, the alleged fraud was presented to the Court, and was adjudged to be without merit. That constituted an end of the litigation over the facts then and now alleged to constitute the fraud.

The fraud apparently claimed was a certain breach of contract or understanding between counsel for certain of the parties and counsel for King. None of the facts alleged constituted a fraud against Thomas or against Irwin, or the others through whom the plaintiffs in error claim.

A fraud against King, if there was any, was no fraud against Thomas, who did not set up any defense to the action as to whom there was no claim of participation in the agreement, the breach of which is alleged to constitute the fraud; but more than that, there were no pleadings that this judgment was void for fraud.

It was a collateral attack upon a judgment rendered some years before in a court of competent jurisdiction. There was no equitable proceeding brought to set aside because of fraud. It is held in *Holly River Coal Company v. Howell*, 15 S. E., 214; 36 W. Va., 489, that—

"Such proceeding was a judicial one, in the nature of a proceeding against the land itself; and, when completed by a sale, is *prima facie* evidence of such forfeiture against all persons. And the orders and decrees made therein are conclusive against strangers in all collateral proceedings." (See headnote 3.)

At page 218 the Court says:

"It is manifest, from the whole scope and tenor of the acts on this subject, that the regularity of the sale of forfeited lands under the decree of the Court was never intended to be drawn in question in any collateral proceeding."

See also *Starr v. Sampsel*, 55 W. Va., 442; 47 S. E., 255, 258.

See *Kent v. Lake Superior Canal Co.*, 144 U. S., 75, 98.

See also *Christmas v. Russell*, 5 Wall., 290, 303.

See *Rhino v. Emery*, 65 Fed. Rep., 826, 835.

Michaels v. Post, 21 Wall., 398, 426.

See *Nougue v. Clapp*, 101 U. S., 551, 555.

"Beyond all controversy the judgment or decree of a State Court rendered in a case of which

it had complete jurisdiction, cannot be revised or set aside by a collateral proceeding here."

McDermott v. Copeland, 9 Fed. Rep., 536.

In West Virginia, where this judgment was rendered, it is held that—

"A judgment or decree for a debt in favor of A against B is conclusive, both between the parties and as to strangers, of the existence, justness and amount of the debt, and can be impeached by a party or a stranger only for fraud or collusion. It can be impeached therefor, not collaterally, but only by a direct proceeding to set it aside by original bill or cross-bill or answer."

Turner v. Stewart, 41 S. E., 924; 51 W. Va., 493.

This cause being at law in the Federal Court of the United States in the State of West Virginia, its rules of action on this subject will be followed.

In order to open or vacate a judgment, it is essential that a meritorious defense be shown; that is, it must be shown that because of the alleged fraud the party claiming to have been defrauded was prevented from presenting a meritorious defense to the action. See 15 R. C. L., 735.

In the objections to the evidence and in the avowal made in this assignment, there was no avowal that any person alleged to have been defrauded had a defense which could have been successfully set up against the judgment complained of, or if he was prevented by this fraud from setting up such a meritorious defense.

As has been pointed out, the avowal nowhere sets up that Thomas or Irwin, or any of the other persons through whom the plaintiffs in error claim were defrauded.

This avowal nowhere declared that any of the defendants had been defrauded by any of the acts alleged.

The fraud alleged to have been committed was alleged to have been committed against King. Even that claim is shown to have been considered by the Court and to have been determined against the claim.

Even if the judgment referred to had been set aside for fraud, it would not have resulted in placing title in the defendants, the plaintiffs in error, for there were other judgments which are not attacked, and which were entirely conclusive against the ancestors of the plaintiffs in error. Giving the fullest force and effect to the contentions of the plaintiffs in error as to this assignment, it could have done them no good.

A patent to land is conclusive in a court of law as against collateral attack.

Tiffany, Real Property, 844.

The plaintiffs in error have not argued this question in the brief filed. Most likely this constitutes an abandonment of the assignment.

THE PLAINTIFFS IN ERROR CLAIM UNDER A SCHOOL COMMISSIONER'S SALE OF THE SAME KIND WHICH THEY ATTACK.

The defendant's exhibit No. 4, Record, page 255, is a deed dated the 25th day of March, 1886, from W. B. McClure, Commissioner of School Lands for the County of Wyoming, to Jessie R. Irwin, which deed was necessarily made under the same law, the effect of which is here attacked.

The plaintiffs in error, therefore, are claiming under the law which they attack, and are in effect asserting its validity with one hand, while they deny with the other.

THIS METHOD OF TAXATION HAD LONG BEEN SUSTAINED.

The method of assessing lands and quieting the title thereto pursued in this case has long been followed in

Virginia and West Virginia. These methods were necessary for the purpose of settling the title to vast tracts of lands which had been granted in Revolutionary times.

In *State v. Sponaugle*, 45 W. Va., 792; 32 S. E., 283, 288; 43 L. R. A., 727, it is held that:

"Titles to thousands upon thousands of acres, the homes of our people, rest upon this long line of enactment and decision; and for this Court to reverse so many cases, and annul the constitutional provision, would shake those titles, and turn thousands from their homes. The rule of stare decisis binds us to adhere to them, especially as titles to property rest on those decisions. Not to do so would spread disaster, the extent of which would be appalling."

This statement is no less true now than it was then.

Respectfully submitted,

ROBERT C. ALSTON,

PHILIP H. ALSTON,

Attorneys for Defendant in Error.

P. O., Atlanta, Ga.

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Supreme Court of the United States

OCTOBER TERM 1916.

NO. 735.

H. C. JONES, EXECUTOR: JAMES DOLLIVER
BROWN, ET AL., PLAINTIFFS IN ERROR,
VS:
BUFFALO CREEK COAL & COKE COMPANY.

MOTION OF THE DEFENDANT IN ERROR,
BUFFALO CREEK COAL & COKE COM-
PANY, TO DISMISS THE WRIT OR AFFIRM
THE JUDGMENT RENDERED BY THE
DISTRICT COURT, AND BRIEF IN
SUPPORT THEREOF.

TO THE HONORABLE, THE JUDGES OF SAID
COURT:

Now comes the defendant in error, Buffalo
Creek Coal & Coke Company, and moves the court
to dismiss the writ of error sued out in this cause by
the plaintiffs in error on the second day of Decem-

ber, 1915, and which writ of error was allowed by the Honorable Benjamin F. Keller, District Judge who presided at the hearing of the cause in the court below, on the ground that this court has no jurisdiction of the judgment rendered in this cause and sought to be reviewed by said writ of error.

And also moves the court to affirm the judgment rendered in this cause on the third day of December, 1914, by the District Court of the United States for the Southern District of West Virginia on the ground that this writ of error was manifestly taken for delay only and that the questions on which the decision of the cause depends are so frivolous as not to need further argument.

The grounds of this motion and statement of the case and facts as well as argument thereon are more fully set forth in the brief of counsel for the defendants in error herewith submitted.

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DOUGLAS W. BROWN,
CARY N. DAVIS,
W. R. LILLY,
R. L. SHREWSBURY,

Counsel for Defendants in Error,
Buffalo Creek Coal & Coke Co.

To H. C. Jones, H. C. Jones, Executor, James Dooliver Brown, I. P. Baer, I. P. Baer, Trustee, Edwin L. Hall, Edwin L. Hall, Trustee, Barbara Hall, John W. Hall, Cora S. Hall, William Haddington, Nancy Haddington, Eliza H. Klecker,

Francis H. Walter, William P. Hall, Anna Hall, Frank Hall, Gladys Hall and Maynard F. Stiles and I. P. Baer, their counsel:

Please take notice that on Monday the 21st day of May, 1917, at the opening of the court, or as soon thereafter as counsel can be heard, the motion of which the foregoing are copies will be submitted to the Supreme Court of the United States for the decision of the court thereof.

Annexed hereto is a copy of the brief or argument to be submitted with said motion in support thereof.

C. W. Campbell

D. W. Brown

C. N. Davis

W. R. Lilly

R. L. Shrewsbury

Counsel for the Defendants in Error,
Buffalo Creek Coal & Coke Co.

STATEMENT.

This suit was instituted in the District Court of the United States for the Southern District of West Virginia, first in the form of a suit in equity, and upon the filing of the answer of the defendants on the 10th day of November, 1914, an order was made transferring the cause from the equity, to the law side. Thereupon plaintiff was required to and did file in lieu of its bill in chancery theretofore filed, a

declaration in ejectment, and later, on the 30th day of November, 1914, filed an amended declaration. These declarations being in form according to the West Virginia practice in ejectment cases.

The defendants appeared and filed a plea of not guilty (the only plea allowed in an ejectment case under the West Virginia practice), but later withdrew this plea of not guilty and filed a disclaimer as to all of the land claimed in the plaintiffs' declaration, except the land embraced in two deeds to the plaintiffs in error, or a portion of them, one dated the 23rd day of October, 1911, between C. F. Thomas of the first part and J. B. Ellison and I. P. Baer, Trustees, of the second part, and a deed from Naaman Jackson, Trustee, to James Dolliver Brown dated the 26th day of July, 1905. As to the land embraced in these two deeds the defendants entered a plea of not guilty of unlawfully withholding the same from the plaintiff, and upon this plea trial was had, and at the conclusion of the evidence introduced by both parties, the court directed the jury to return a verdict in favor of the plaintiffs for all of the land in the declaration mentioned except a few acres enclosed by a fence, and as to the land thus enclosed by a fence, directed a verdict in favor of the defendant, James Dolliver Brown, for the land within the enclosure. Which verdict the jury returned and a motion was made to set it aside which was overruled by the court and judgment entered in accordance with the verdict, on the 3rd day of December, 1914.

This writ of error is prosecuted to set aside the judgment thus rendered.

The title of the defendant in error to the land in controversy in this case has been involved in three

separate school land suits or proceedings brought by the State of West Virginia under Chapter 105 of the Code, for the sale of land for the benefit of the school funds.

These three suits are well known to the history of school land litigation conducted in the courts of West Virginia and in the courts of the United States, including this court, in fact, the case at bar is the aftermath of the litigation of the non-tax paying land claimants of Southern West Virginia, who have without paying any taxes or making any improvements upon the land, claimed by them, succeeded in keeping the titles of the real owners of the lands who were both improving the same and paying the taxes thereon, in continuous litigation for a quarter of a century or more. The three school land proceedings referred to are as follows, viz:

1. STATE OF WEST VIRGINIA VS. JESSE R. IRWIN ET AL., INCLUDING C. F. THOMAS AND EMMA I. POMEROY.

2. STATE OF WEST VIRGINIA VS. HENRY C. KING ET AL., INCLUDING C. F. THOMAS AND U. B. BUSKIRK, TRUSTEE.

3. STATE OF WEST VIRGINIA VS. ALEXANDER McCLINTOCK ET AL., INCLUDING C. F. THOMAS AND BUFFALO COAL & COKE COMPANY, GRANTOR OF THE DEFENDANTS IN ERROR AND THE PLAINTIFF BELOW.

The defendant in error derives title to the land in controversy through and by a sale made in the

cause first above mentioned to Stoddard and Hall, and through U. B. Buskirk, Trustee, and the Buffalo Coal & Coke Company, defendants, in the second and third suit above mentioned.

The plaintiffs in error's claim of title, was derived from C. F. Thomas, a defendant in each of the suits mentioned above, except the defendant, James Dolliver Brown, who had no claim to said land, except that of a squatter or simple possession thereof without color of title, and during his possession he had enclosed a small portion of the land in controversy and he was given judgment for the part so enclosed.

A statement in detail of the title to the land in controversy of the defendant in error is found in the printed record beginning on page 26 in the form of a stipulation entered into between counsel and introduced in evidence upon the trial of this cause.

A brief statement of the material facts necessary for the decision of this motion is as follows:

I.

On the 28th day of June, 1893, Jesse R. Irwin, Harris Hoyt, Marie E. Hoyt, Alvin Irwin and Marie Irwin made a deed to Emma Idelia Pomeroy, which deed was recorded in the office of the clerk of the county court of Logan County in Deed Book "R", page 169, granting and conveying to Pomeroy the following described boundary of land, to-wit:

"Beginning at a stone on the north line of the Sarver survey of the 480,000 acre Morris tract at the point where the Guyan-

dotte River crosses the said line and on the easterly bank of the said river thence running in a southerly direction following the meanderings of the Guyandotte River crossing the Buffalo and Big Huff Creek at their mouths about five thousand seven hundred and sixty poles to where the said river crosses the Wyoming line thence running in a northeasterly direction with the said county line about four thousand eight hundred poles to a stone where the said Wyoming line crosses the north line of said survey thence with the said north line of the said Sarver survey about three thousand eight hundred and forty poles to the place of beginning containing twenty thousand acres more or less after deducting from the boundary aforesaid all legal junior grants and school sales."

This deed was introduced in evidence as Exhibit No. 1 with the stipulations as to the title in this case, and is found on page 38 of the printed record.

In the stipulations filed in this case, (printed record page 27) there is the following agreement as to the land in controversy and its relation to this deed, viz:

"and that the land in controversy in this suit and described in the plaintiff's declaration lies entirely within the boundary described and purported to be conveyed by said deed to the said Emma Idelia Pomeroy."

II.

As to this land it is further agreed in said stipulations (printed record page 27), as follows:

"That for the year 1894 the same Emma Idelia Pomeroy had entered upon the land books of Triadelphia District (the district in which said land is situated), Logan County, West Virginia, and was assessed with taxes thereon, with 20,000 acres, with the notation in the column marked 'description, etc.' as follows: 'Transferred from Alvin Irwin and Marie E. Hoyt,' which taxes so assessed were not paid and said land was returned delinquent, and in pursuance of said delinquency sold in December, 1895, and purchased by the State of West Virginia, and was not redeemed within the year allowed for redemption of land sold at tax sales, and was on the third day of May, 1897, certified by the Auditor of the State of West Virginia to the Commissioner of School Lands of Logan County as liable to sale for the benefit of the school fund."

We thus have the Pomeroy 20,000 acre tract and the land in controversy in this suit as a part thereof, assessed with taxes in the name of Mrs. Pomeroy, and returned delinquent, sold and purchased by the state, and not redeemed within the year as allowed by law and certified by the Auditor of the state to the School Land Commissioner of Logan County for sale.

The Code of West Virginia, Chapter 31, Section 31, provides:

"When any real estate is offered for sale

as aforesaid, and no person present bids the amount of taxes, interest and commission due thereon, the sheriff or collector shall purchase the same on behalf of the state for the taxes thereon, and the interest on the same, and shall make out a list thereof under the following caption."

Then follows the form for the returns by the sheriff of the purchases made above.

Section 32 as to the title acquired by the state under such purchase, says:

"The Auditor shall cause all the lists received in his office under the preceding section to be recorded in a well-bound book, and all such estate, right, title and interest in the real estate mentioned in such lists as would have vested in an individual purchaser thereof at such sale who had obtained proper deeds therefor and caused them to be admitted to record in the proper office, shall by said sale and the purchase on behalf of the state vest in the state without any deed or other conveyance therefor to the state; subject, however, to the right of redemption mentioned in the next section."

The next section gives the person in whose name the land was sold, or persons having liens thereon, one year in which to redeem from the state the land so sold for taxes, it being shown, however, in this case, that the year for redemption had expired and no redemption made.

The above-quoted section gives to the state such title as would pass to an individual purchaser after he had received and recorded his deed. The

title that would pass to the individual purchaser being defined in Section 25 of Chapter 31 as follows:

“When the purchaser of any real estate so sold and not redeemed as aforesaid, his assignee or heirs or devisees shall have obtained deed therefor, according to the provisions of this chapter, and caused the same to be admitted to record in the office of the clerk of the county court of any county in which such real estate, or any part thereof, may be, such right, title and interest in and to said real estate as was vested in the person or persons charged with taxes thereon for which it was sold, at the commencement of, or at any time during the year or years for which said lands were assessed, and all such right, title and interest therein of any other person or persons having title thereto, who have not in his or their own name been charged on the land books of the proper county, or persons having title thereto who have not in his or their own name been charged on the land books of the proper county, or assessment district, with the taxes chargeable on such real estate for the year or years, for the taxes of which the same was sold, and have actually paid the same as required by law, shall be transferred to and vested in the grantee in such deed, notwithstanding any irregularity in the proceedings under which the same was sold.”

Under the above stipulations we have all the title of Emma Idelia Pomeroy vested in the state, and we also have the title of any other person or persons who were not charged upon the land books

with taxes upon this land under their title or claim of title, transferred to and vested in the state under this purchase; so all titles or claims of title held by any person or persons whomsoever, and who were not charged with taxes upon the land were by this sale in the name of Mrs. Pomeroy transferred to the state.

III.

In Section Ten of the stipulations, found on page 152 of the printed record, it is agreed as follows:

“ It is also agreed that the land in controversy has not been assessed to the defendants except as shown by the certificate of the Auditor of the State of West Virginia, which certificate is hereto attached, marked Exhibit No. 5”.

This certificate is found in the printed record, page 69, and it shows that neither C. F. Thomas, the grantor of the defendants, any of the defendants, nor Naaman Jackson, Trustee, grantor of James Doliver Brown, were assessed with taxes upon the land in controversy for either of the years from and including 1889 to and including 1912.

Thus whatever title or claim of title C. F. Thomas and Naaman Jackson, grantors of the defendants, or any of the defendants, had to any of the land embraced in the Pomeroy 20,000 acres, which includes the land in controversy in this case, was by said sale transferred to and vested by said sale under the statute then in force to the state.

Also, all claims of title under the 500,000 acre grant to Robert Morris, and the 142,000 acre grant to DeWitt Clinton were also vested in the state by forfeiture at the time of this purchase under the Pomeroy tax assessment and sale. This is shown by the records in said causes filed in this case.

We thus have all titles and claims of title of all persons connected in any way with this land thus united and reinvested in the State of West Virginia, and the state being thus vested with all of said titles, institutes suit to sell the land in controversy in this case for the benefit of the school fund.

IV.

STATE OF WEST VIRGINIA VS. JESSE R. IRWIN ET AL., INCLUDING C. F. THOMAS AND EMMA I. POMEROY.

This was a suit instituted by the state under Chapter 105 of the Code to sell the Emma I. Pomeroy 20,000 acres for the benefit of the school fund. The record in this last-mentioned cause was introduced in evidence in the case at bar, and is found in the printed record beginning on page 40 and extending to the middle of page 60. The plaintiff's Bill in this case of the State against Irwin set out the fact as agreed to in the stipulations above quoted, that in the month of December, 1895, the sheriff of Logan County sold a number of tracts of land for the non-payment of the taxes then due, and unpaid, upon said land, that the sheriff purchased said land for the state in the mode prescribed by law,

that said sale was reported by the sheriff to the clerk of the county court of Logan County, and by the clerk reported to the Auditor of the state, who, after the expiration of twelve months next succeeding the sale of said real estate, certified a list of said real estate not redeemed to the Commissioner of School Lands for Logan County, that the Commissioner reported the lands to the Circuit Court on the third day of May, 1897, as being liable to sale for the benefit of the school fund, that a decree was entered directing this suit to be brought, and further alleges that by reason of the purchase of the various tracts and lots of lands mentioned in said report, and the failure of the former owner to redeem the same, the title thereto was vested in the state, and described the lands therein proceeded against as follows:

"Tract No. 42, containing 20,000 acres, forfeited in the name of Alvin Irwin and Marie E. Hoyt for the non-payment of the taxes thereon for the year 1893, and also Tract No. 43 in said report, containing 20,000 acres, and forfeited in the name of Emma I. Pomeroy for the non-payment of taxes due thereon for the year 1894."

To this Bill, in addition to Jesse R. Irwin and the other grantors, Mrs. Pomeroy was made a party, and also Charles F. Thomas and J. B. Wilkinson, who, the Bill alleges, are each claiming an interest in certain portions of said land, and the Bill asserted the fact to be that they have some kind of title to portions of said land, and the plaintiffs charged that whatever title they or either of them had, if

any, had been forfeited to the state, as above stated, and that neither of them had paid taxes upon said two tracts of land, or any part thereof, since said forfeiture.

On the 4th day of November, 1897, a decree was entered appointing J. B. Wilkinson guardian ad litem for the infant defendants, and showing his appearance and filing of an answer for the infants, and also adjudicating,

“And it appearing to the court that the process in this cause has been regularly executed and served upon the defendants, Jesse R. Irwin, Harris Hoyt, Charles F. Thomas, Marie Irwin, Emma Pomeroy, J. B. Wilkinson and Marie Hoyt, and the adult defendants having failed to appear and plead, the cause was heard.”

See printed record, page 47. On this page is also found process accepted by the attorney in fact for C. F. Thomas.

This order also referred the cause, under provisions of the statute, to a commissioner in chancery, who was directed to publish the notice to the plaintiff and the defendants, and to unknown owners and claimants of the land, required by the statute, and to make report as to whether or not the land was forfeited and liable to sale for the benefit of the school fund, and the amount of taxes thereon, and who, if anyone, was entitled to redeem the land or to the excess of the purchase money over the taxes, interest etc.

The commissioner in chancery, after giving the notice as required by the statute and as directed in

the decree, (see printed record, pages 48, 49, 50 and 51), made and filed his report in said court on the sixth day of April, 1898, in which he stated that the land mentioned in the plaintiff's bill was conveyed or deeded from Irwin and others to Mrs. Pomeroy, his statement being in words and figures following, to-wit:

"IN 1893 JESSE R. IRWIN, HARRIS HOYT, MARIE HOYT, ALVIN IRWIN, MARIE IRWIN DEEDED 20,000 ACRES TO EMMA POMEROY. IT WAS RETURNED DELINQUENT FOR THE YEAR 1893 IN THE NAME OF ALVIN IRWIN AND MARIE HOYT. IN 1894 RETURNED DELINQUENT IN THE NAME OF EMMA POMEROY." (Capitals ours.)

This report of the commissioner also found that the land was forfeited in the year 1894 in the name of Emma Pomeroy, and also ascertained the taxes chargeable against said land, by charging the taxes for the year 1894 against Mrs. Pomeroy, and the previous taxes thereon to the other claimants of the land. This report was confirmed by the court by an order entered on the 29th day of April, 1898, and the land in the bill and proceedings mentioned decreed to be sold for the benefit of the school fund.

In pursuance of this decree directing sale of the land on the 18th day of October, 1898, said land was sold at public auction at the front door of the court house of Logan county, at which sale Willaim H. Stoddard and Amos C. Hall became the purchasers

thereof. This sale was reported to the court, and the report and the sale thereunder made confirmed by decree entered in said cause on the third day of November, 1898, (see printed record, page 54), and J. B. Wilkinson was appointed Special Commissioner to convey to the purchasers the land so purchased, being the land described in the Bill and proceedings.

V.

On the 12th day of November, 1898, Wilkinson, as such special commissioner, made a deed to Stoddard and Hall, attempting to comply with the decree confirming the sale and appointing him special commissioner. In this deed Wilkinson, instead of describing the land by the calls in the deed from Jesse R. Irwin and others to Emma I. Pomeroy, made in the year 1893, as the commissioner in chancery had reported the land involved in the proceedings to be described, and as the bill in the cause showed the land therein proceeded against to be the land assessed to Mrs. Pomeroy under said deed and returned delinquent in her name and purchased by the state under a sale for taxes made under said assessment, described said land as 20,000 acres situate in Logan and Mingo Counties, (Mingo County having been formed out of a part of Logan County between the date of the assessment in 1894 to Mrs. Pomeroy, and the Wilkinson deed), and then gave a description by metes and bounds of a 480,000 acre survey granted to Robert Morris, and stated that the land conveyed was the part of the 480,000 acres situate in said counties. To understand the deed made by the Special Commissioner in this case it is necessary to review facts in

evidence in the case at bar, which precede in point of time the deed to Mrs. Pomeroy.

In 1795 the State of West Virginia granted to Robert Morris the 480,000 acres of land, describing it by the calls given in this deed. In 1886, in a school land proceeding in the county of Wyoming, Jesse R. Irwin purchased the portion of the 480,000 acres then not held by junior claimants and protected by the constitution and laws of the State of West Virginia from sale by the Commissioner of School Lands, estimated by William T. Sarver to be 20,000 acres in Logan County, 10,000 acres in McDowell County, and 10,000 acres in Wyoming County.

In the proceedings under which Irwin purchased, William T. Sarver was appointed a surveyor to locate the 480,000 acres. He ran the lines of said survey by course and distance, disregarding the natural monuments called for in said grant. As thus run by Sarver the 480,000 acres embraced the land included in the deed to Mrs. Pomeroy, and in controversy in this suit. Following Irwin's purchase he made deeds to other parties mentioned in the cause of the State of West Virginia against Jesse R. Irwin and others for various interests in this land, including C. F. Thomas, all of which deeds described the land by their original patent calls, some of them, however, referring to the Sarver survey and others not.

It is very apparent, however, that from the assessment of taxes against Irwin and his grantees, that they were claiming the land in controversy, and were thus claiming the land according to the Sarver location of the 480,000 acres, and it was evident that the commissioner had in mind the Sarver location of

the 480,000 acres in thus describing the land in his deed by the patent calls of the 480,000 acres. The 480,000 acre tract, if located as the defendants attempt to locate it by the natural monuments, according to the evidence of the witness, W. D. Sell, introduced by the defendants, does not include any of the land in controversy in this case, any of the land embraced in the Pomeroy deed, any land in either Logan or Mingo Counties, and if the deed made by Wilkinson, Special Commissioner, is construed not to be according to the Sarver survey or location of the 480,000 acre grant, then no deed was made to Stoddard and Hall for the land they purchased in the cause of the State against Irwin. In that event the plaintiff below, defendant in error, relies upon this sale and purchase in this cause, and the act of the legislature of the State of West Virginia passed in the year 1905 amending Sections 6 and 19 of Chapter 105 of the Code of West Virginia, which act, as construed by the Supreme Court of West Virginia, was a legislative grant, granting to the successors in title of Stoddard and Hall, under whom the plaintiff below, defendant in error claims, the land in controversy in this case, of which legislative grant the court, in the case of State against King, 64 W. Va., page 621, says

“But granting that there was irregularity in the sale to Stoddard and Hall, either by reason of the Wilkinson deed, the lack of the deed, if there is none, or the absence of King as a party from the Hinchman suit, the sale to Stoddard and Hall was validated by Section 19, Chapter 105, of the

Code, its very self a legislative grant. The language of that enactment, that legislative grant of this land to Stoddard and Hall, or their successors, is whatever right, title, interest and estate the State of West Virginia had to any lands at the date of the sale or conveyance thereof, or instrument purporting to convey the same heretofore made by said state through and by the commissioner of school lands of any county, under an order or decree of the circuit court, in any suit or proceedings under said Chapter 105 of the code, however derived or claimed, shall be deemed and held to have passed to and vested in the grantee thereof, whether the land so sold was proceeded against as forfeited, escheated or as waste and unappropriated land, notwithstanding any irregularity or error in such proceedings, or informality in such sale. The legislature had full power to dispose of the state's property. In pursuance of a well-meant policy, it saw fit by the enactment aforesaid to validate the sale to Stoddard and Hall, if it was not before validated, and to vest whatever right, title, interest and estate the State of West Virginia had to the 20,000 acres at the date of the sale thereof. If it was only King's forfeited title that the state had at the date of this sale that act vested it in Stoddard and Hall, or their successors. We can do nothing to give effect to this plain legislative grant. It is not unlike the old legislative grant to Dumas, Trustee of the Swan lands, which is the very saving of King's claim of title to the Morris grant. Not content with the words aforesaid, the legislature is more emphatic in these words: 'and all such sales and conveyances and purported conveyances

are hereby confirmed and made good and valid'. Thereby has been confirmed and validated the Stoddard and Hall title, now owned by Buskirk. The state had the power to give them the lands and deny King the grace of redemption. It did so by this act, if Stoddard and Hall did not have good title by their purchase aforesaid."

This opinion of the West Virginia Court was reviewed by this court, see *King vs. West Va.*, 216 U. S., 99.

The land in controversy in this case as a part of the Pomeroy 20,000 acres was the land spoken of by this court as having been thus granted by the legislative grant to Stoddard and Hall.

VI.

It is admitted in the stipulations filed as a part of the record in this cause, (see printed record, page 28), that on January 4, 1900, Stoddard and Hall, purchasers, made a deed to Henry Patton, Trustee, who held as trustee for himself, Stoddard and Hall, and O. L. Snider, and that Henry Patton, Trustee, and the people for whom he held, on April 1, 1904, made a deed to M. B. Mullins; that M. B. Mullins dies intestate on the 16th day of January, 1906, leaving May Mullins, his widow, and Milton A. Mullins, his sole heir at law, and that Milton A. Mullins, on the 26th day of October, 1906, made a deed to U. B. Buskirk, Trustee, and that U. B. Buskirk, Trustee, held said land in trust for himself, J. Cary Alderson, R. L. Shrewsbury and W. R. Lilly; and that on June 8, 1907, U. B. Buskirk and the parties for whom he

held as trustee, made a deed to the Buffalo Coal & Coke Company; that May Mullins, widow, also made a deed to the Buffalo Coal & Coke Company; and that on the 15th day of August, 1911, the Buffalo Coal & Coke Company made a deed to the Hector Coal Land Company, who conveyed to the defendant in error. That the land described in the plaintiff's declaration was included within the boundaries of each of the deeds above-mentioned, and that all the right, title, interest and estate acquired by W. H. Stoddard and Amos C. Hall under and by virtue of the proceedings in the case of the State of West Virginia against Jesse R. Irwin et al., as well as by the deed from J. B. Wilkinson, Special Commissioner, to them, passed from said Stoddard and Hall by virtue of the deeds above mentioned to the plaintiff below, defendant in error; and also all the right, title, interest and estate acquired by any of the above-mentioned parties under section 3, Article 13, of the Constitution of the State of West Virginia, and by virtue of an act of the legislature of West Virginia passed in the year 1905, amending sections 6 and 19 of Chapter 105 of the Code of West Virginia; and also all the right, title, interest and estate acquired by any of the above-mentioned parties under the proceedings or decrees in the case of the State of West Virginia against Henry C. King and others, and the State of West Virginia against Alexander McClintock and others, passed to the plaintiff, the Hector Coal Land Company. The defendants, however, not admitting that any title passed to W. H. Stoddard and Amos C. Hall to the land in controversy on account of the proceedings in the case of the State of West Virginia against Jesse R. Irwin and others, or that any title passed by

reason of the constitution and the legislative enactment aforesaid, it being agreed as follows:

"It being the purpose of this paragraph 7 (printed record pages 149 to 152), to admit the conveyances and descent herein described as the plaintiff's chain of title through the persons herein mentioned from Stoddard and Hall to the plaintiff, placing the Buffalo Creek Coal and Coke Company as successors to such rights and only such rights to the land in the declaration as was vested in Stoddard and Hall aforesaid, and in the several persons between said Stoddard and Hall and the plaintiff; but nothing hereinbefore stated or agreed to is to be construed to prevent the defendants from proving outstanding title by forfeiture or otherwise as to any person in said chain of title." (Printed Record page 30.)

Thus by agreement of the parties the Buffalo Creek Coal & Coke Company is admitted to be the successor in title of the land in controversy of Stoddard and Hall, M. B. Mullins, U. B. Buskirk, Trustee, and Buffalo Coal & Coke Company, and whatever title either of said parties had to the land was transferred to and vested in the plaintiff below, the defendant in error.

VII.

**STATE OF WEST VIRGINIA AGAINST
HENRY C. KING .ET AL., INCLUDING C. F.
THOMAS AND U. B. BUSKIRK, TRUSTEE.**

In 1795 the Commonwealth of Virginia granted to Robert Morris 500,000 acres of land situate in what is now Logan, Wyoming and McDowell Counties.

On the 7th day of May, 1894, the State of West Virginia, as plaintiff, instituted suit in chancery in the Circuit Court of Wyoming County against Henry C. King and others, including C. F. Thomas, the object of which suit was to sell for the benefit of the school fund the tract of 500,000 acres of land granted to Robert Morris, and which grant had become forfeited to the State for the failure of the former owners to have said land entered upon the land books and charged with taxes thereon for more than five successive years prior to the institution of the suit. Henry C. King had a chain of title derived by regular chain of deeds, decrees, etc., from the original grantee, Robert Morris; said suit being a regular proceeding under Chapter 105 of the Code of West Virginia to sell for the benefit of the school fund said tract of land forfeited to the State, it being admitted that the land in controversy in the cause at bar is within the 500,000 acre Robert Morris grant as located by the decree of the Circuit Court of Wyoming County entered on the 30th day of September, 1897, but is not within the 500,000 acre Morris grant as located by the decree of the Circuit Court of Marion County made in the year 1905.

The Bill in the cause was filed at May Rules, 1894. Later the first, second, third and fourth amended bills were filed in said cause by the state.

"The said cause was matured for hearing by entering, publishing and posting of

the proper order of publication in said cause as to all of the parties mentioned in said fourth amended bill, and by the filing of an answer for the infant defendants in said bill by guardian ad litem." (See printed record, page 33.)

The parties mentioned as defendants in said fourth amended bill are Henry Clay King, * * * * * Jesse R. Irwin, Virginia Irwin, Ethel Irwin, Clara Irwin, Alvin Irwin, the four last named are infant heirs of Alvin Irwin, deceased; Harris Hoyt, Marie E. Hoyt, C. F. Thomas, S. F. Dunham, William C. Jones, John T. Willis and Nathaniel R. Benson. (See printed record, page 71.)

The bill in this cause sets out in a formal way the grant of the 500,000 acres to Robert Morris, its forfeiture, and that Henry C. King claimed to be the owner thereof, and states that said land is liable to be sold for the benefit of the school fund under said forfeiture, and prays for a sale of said land; the allegation of said bill as to C. F. Thomas and his co-claimants being as follows:

"The plaintiff further says that the defendants, Jesse R. Irwin, Harris Hoyt, Marie E. Hoyt, C. F. Thomas, S. F. Dunham, William C. Jones, John D. Willis and Nathaniel R. Benson, claim title to a 480,000 acre tract of land which lies in the said counties of Wyoming, Logan, Mingo and McDowell, and said last-mentioned tract of land,—a large portion of the territory is covered by said 500,000 acre tract; in fact, plaintiff is informed the two tracts overlap

each other in the counties of Wyoming, Logan and Mingo, and probably in McDowell County." (See printed record, page 73.)

To this bill of complaint Henry C. King filed an answer denying the forfeiture of the 500,000 acre grant and the validity of the constitutional provision of the State of West Virginia forfeiting lands for failure of the owner to have the same entered upon the land books and to have himself charged with taxes thereon, and also offered to pay the taxes in arrears on said tract and asked to be allowed to redeem said land if it should be adjudged to be forfeited.

Alexander McClintock, who claimed to own the DeWitt Clinton grant of 142,000 acres, also filed a petition asking to be made a party to said cause, and that his petition be treated as his answer to said fourth amended bill. This cause was by a decree of the Circuit Court of Wyoming County referred to D. A. Robertson, Commissioner in Chancery, who made a report finding that of said 500,000 acre grant, not claimed by junior claimants, to be forfeited, on which the commissioner calculated the taxes, interest, etc., and after the filing of this report on the 30th day of September, 1897, a decree was entered in said cause allowing Henry C. King to redeem the West Virginia portion of said 500,000 acre grant, according to a re-survey made thereof by W. D. Sell, which survey as made by W. D. Sell embraced and included within the boundaries of the 500,000 acres, all of the land in controversy in this suit. (See printed record, page 33.)

After the entering of the decree of September 30, 1897, the State of West Virginia obtained an appeal from the Supreme Court of Appeals of West Virginia from said decree, which appeal being matured and heard, the Supreme Court of Appeals of West Virginia reversed said decree insofar as it allowed Henry C. King to redeem the land described in the decree, by reason of the payment of the sum of \$3090.80, costs, taxes, and interest as fixed by the circuit court, and insofar as it ascertained and fixed the costs, interests and taxes to be paid, the mandate on said bill being entered on the 7th day of February, 1900. The cause was remanded to the Circuit Court of Wyoming County, and on the 28th day of June, 1900, was removed by an order entered therein to the Circuit Court of Logan County. On the 27th day of July, 1900, a fifth amended bill was filed, bringing in a number of new parties who were mentioned in the answer of Henry C. King as parties claiming adversely to the 500,000 acre grant. The cause was then transferred to and docketed in the Circuit Court of Cabell County, in which court, on the 22nd day of March, 1900, Henry C. King filed an amended petition and answer claiming title, as in his first answer, to the 500,000 acre grant, but mentioning certain tracts of land claimed adversely to the 500,000 acre grant, which he did not desire to redeem, none of which last tracts, however, cover any of the land in controversy in this suit. On the 5th day of July, 1901, William H. Stoddard and Amos C. Hall filed a petition in the cause claiming said land under the purchase hereinbefore set out as having been made to them in the cause of State of West

Virginia against Jesse R. Irwin and others. To this petition Henry C. King filed an answer denying the title claimed by said Stoddard and Hall.

On the 28th day of December, 1903, the cause was removed from the Circuit Court of Cabell County to the Circuit Court of Marion County, and while this cause was pending in the Circuit Court of Marion County, U. B. Buskirk, Trustee, filed a petition and an amended petition, in each of which he claimed the land in controversy in this suit, as well as other portions of the land embraced in the Pomeroy deed, as successor in title to the said Stoddard and Hall. In his petitions Buskirk set out the deed from Jesse R. Irwin and others to Emma I. Pomeroy; the entry of the land in her name upon the land books of Triadelphia District, Logan County, West Virginia; the return of said land delinquent for the taxes assessed thereon; the sale of said land by the Sheriff of Logan County and purchase thereof by the state; the failure of Mrs. Pomeroy to redeem within the year, and the certifying of said land by the Auditor of the State to the Commissioner of School Lands of Logan County as liable to sale for the benefit of the school fund; the report of the School Land Commissioner to the Circuit Court of Logan County of said tract of land; the institution of the suit of the State of West Virginia against Jesse R. Irwin and others, including C. F. Thomas, and the proceedings had in said cause, and the sale of the Pomeroy tract of land in said cause to Stoddard and Hall, filing with his petition a certified copy of the proceedings in said cause, which was a copy of the same papers filed in this cause, and

found in the printed record here, filed in this case as "Exhibit No. 2", entitled "Record of the State of West Virginia vs. Jesse R. Irwin et al."

This petition was designated and intended as a petition making the petitioner, Buskirk, a party to the suit, and as an answer to the plaintiff's original and five amended bills, and as an answer to the petition of Henry C. King claiming the right to redeem said land, and as an answer to the petition of Altizer, Joyce and others, asking to redeem said land, the defendants mentioned in this petition of Buskirk, Trustee, being all the defendants in the cause who had filed pleadings of any kind therein, which in any way affected the lands claimed by Buskirk. The other four hundred or more defendants were not mentioned in the petition of Buskirk, Trustee; C. F. Thomas along with the others, as he had filed no answer, and ten years before the filing of this petition a decree had been entered in the cause which was binding upon C. F. Thomas, who was a party to the cause at the time it was rendered, and which decree was a complete adjudication against said Thomas as to any claim he might have to the land in controversy in said cause.

The cause of the State of West Virginia against Henry C. King and others was, after the filing of the petition by Buskirk, Trustee, matured for hearing, Henry C. King filing an answer to said petition of Buskirk, Trustee, and on the 11th day of January, 1908, the Circuit Court of Marion County entered a decree in said cause, (See printed record, page 258),

which recites the hearing of said cause upon the bills heretofore mentioned, the answer of King, the petitioner, of Stoddard and Hall, Mullins and U. B. Buskirk, Trustee, and the answer of King to said petition, and upon the exhibits filed with said petitions and answer, and upon said hearing

"It was adjudged, ordered and decreed that the lands claimed by said petitioner, Buskirk, Trustee, et al., and described in their amended petition and exhibits filed therewith, be and the same are hereby dismissed from this suit, which said lands so dismissed from this suit are situate in Logan and Mingo Counties, West Virginia, and are located and described by metes and bounds as follows:"

The fourth boundary or tract of land described in this decree being the tract of land described in the plaintiff's declaration in the cause at bar.

"And as to the lands so dismissed from this suit, it is further adjudged, ordered and decreed that said original bill and several amended bills of the plaintiff, and the several petitions and amended petitions of Henry C. King be and the same are hereby dismissed, and that the right of the plaintiff to sell any of the lands so dismissed from this suit be and the same is hereby refused and denied, and the right of Henry C. King to redeem any of said lands so dismissed from this suit is likewise hereby denied and refused."

This decree being entered under the provisions of Sections 6 and 19 of Chapter 105 of the Code of West Virginia, which provides that pending any suit to sell land as forfeited to the state, when it is made to appear that the land has once been sold by the state in another school land proceedings, that the land so sold shall thereupon be dismissed from the suit, and that the state shall proceed no further against it, and that the former owner shall not be allowed to redeem it, Section 20 of said Chapter 105 providing for the effect of such final decree as above-mentioned, when entered in a school land suit, and which Section 20 says:

"Every final decree entered in such suit shall be a bar to the claim of every person to the real estate or any part of it, or any lien thereon, or to the proceeds thereof, who has failed to appear and present his claim thereto, as provided in the sixth section of this chapter, except as to the excess of the proceeds of the sale thereof as provided in section sixteen of this chapter."

From this decree thus dismissing the land in controversy in this cause Henry C. King obtained an appeal from the Supreme Court of West Virginia, and upon his appeal the cause was heard in that court, and the decree of the Circuit Court of Marion County affirmed. (See 64 W. Va., page 610.)

Thereupon Henry C. King obtained a writ of error from the Supreme Court of the United States to the decree of the Supreme Court of the State of West Virginia affirming the decree of the Circuit

Court of Marion County. This cause was heard in the Supreme Court of the United States, and this court, upon final hearing, dismissed said cause for want of jurisdiction.

VIII.

STATE OF WEST VIRGINIA AGAINST ALEXANDER McCLINTOCK AND OTHERS.

In the year 1893 the State of West Virginia, as plaintiff, instituted a suit in the Circuit Court of Logan County against Alexander McClintock and others, including C. F. Thomas, and filed its bill therein at July Rules of said year, in which it alleges that a tract of 142,000 acres granted on the 19th day of February, 1796, to Dewitt Clinton upon an inclusive survey of 182,000 acres, 40,000 acres included within the exterior boundaries of said survey being covered by prior claims or grants, was forfeited to the State of West Virginia and liable to sale for the benefit of the school fund, and that Alexander McClintock was the successor in title to Dewitt Clinton

* * * * Jesse R. Irwin, Alvin Irwin, Harris Hoyt, Marie E. Hoyt, C. F. Thomas, were made defendants, the bill alleging as to the defendants Jesse R. Irwin, C. F. Thomas and Harris Hoyt as follows:

“The plaintiff here alleges that no part of the 480,000 acres of land laps over or in any wise interefers with the 142,000 acres; that even if it does, which this plaintiff in no wise admits, all that portion of which is

claimed to lie in Logan County and which is claimed to overlap the 142,000 acres, is forfeited to the State for non-payment of taxes thereon for the year 1886; that the same forfeited to the state for non-payment of taxes thereon for that year in the name of the defendants, Jesse R. Irwin, C. F. Thomas, Harris Hoyt and Alvin Irwin, and was sold by the sheriff of said last-mentioned county (Logan County), on the 13th day of February, 1888, and purchased by said Sheriff for the state and not redeemed within one year thereafter, as required by law, and has not since been redeemed, exonerated or released from said forfeiture."

On the 9th day of September, 1893, by decree entered in said cause, (See page 150 of printed record) it was adjudged that the

"Summons in this cause having been duly executed upon the defendants, Alexander McClintock, John McClintock, * * * Jesse R. Irwin, by personal service, and upon all of the other defendants by order of publication duly published and posted as required by law, the plaintiff's bill and exhibits filed in this cause having been regularly matured at Rules and set for hearing."

This decree further brings the cause on for hearing and refers the cause to J. Cary Alderson, Commissioner in Chancery, requiring him to report whether or not the 142,000 acre tract of land was forfeited and liable to sale for the benefit of the school fund, who was entitled to redeem the same, etc.

On the 19th day of June, 1894, J. Cary Alderson filed his report under this decree, reporting various parcels of this land liable to sale for the benefit of the school fund, and the taxes properly chargeable thereon. Thereupon Alexander McClintock filed a petition in said cause asking to be allowed the surplus proceeds arising from the sale of said land in said cause. Henry C. King also filed a petition in said cause, claiming the land therein sought to be sold as a part of the 500,000 acre grant. The cause was then transferred to Kanawha County, and later to Marion County. In the Circuit Court of Marion County an amended bill was filed, to which Henry C. King also filed an amended answer. Later the cause was transferred to the Circuit Court of Logan County, and on the 30th day of July, 1907, a decree was entered in the cause referring it to Robert Bland, Commissioner in Chancery. While the cause was pending before Commissioner in Chancery Bland, the Buffalo Coal & Coke Company and the Altizer Coal Land Company filed a petition in said cause under the statute allowing petitions to be filed while suits for the sale of school lands are pending before Commissioners in Chancery, in which petition they set out a chain of conveyances showing that they were the owners, the Buffalo Coal & Coke Company of all the land on the south side of Buffalo Creek, and the Altizer Coal Land Company of all the land on the north side of Buffalo Creek, within the boundaries of the parcels of land sought to be sold in said cause, deraigning their title under the deed made in 1893 from Jesse R. Irwin and others to Emma I. Pomeroy,

the assessment of the land to her in the year 1894, the return of said land delinquent for the non-payment of the taxes thus assessed, the sale of said land by the sheriff under said assessment, the purchase of said land by the sheriff for the state, the return of the sheriff of said sale to the clerk of the county court, his report to the auditor, and the report of the auditor that said land was liable to sale for the benefit of the school fund, and the institution of the suit of the State of West Virginia against Jesse R. Irwin and others, including C. F. Thomas, in which said land was sold to Stoddard and Hall, and also showing the conveyances from Stoddard and Hall to the Buffalo Coal & Coke Company of the land in controversy in this suit as Tract No. 4 in the deed to the Buffalo Coal & Coke Company, and also setting up the adjudication made in the cause of the State of West Virginia against Henry C. King, wherein said land was dismissed from the suit of State against King, and therein decreed not to be liable to sale as school lands, and claiming said land under the proceedings in the cause of the State of West Virginia against Jesse R. Irwin et al., including C. F. Thomas, and under the decrees in the cause of the State of West Virginia against Henry C. King, and denying the right of the state to sell said land, and prayed that the same be dismissed so far as the same was within the boundaries of the tract of 20,000 acres described in the Pomeroy deed.

On the 26th day of April, 1910, Robert Bland, Commissioner in Chancery, filed his report in said cause, (See printed record, pages 336 to 348), in which report said Commissioner found that the

142,000 acre grant made to Dewitt Clinton was forfeited to the state and liable to sale for the benefit of the school fund; that it became so forfeited five years after the year 1869. Said Commissioner was also required to report "whether or not any portion of the Dewitt Clinton survey has been sold in proper proceedings by the commissioner of school lands in Logan County." Under this requirement said Commissioner reported

"that all the land embraced in the twenty-two descriptions filed with the plaintiff's bill in this cause was sold by the Commissioner of School Lands of Logan County, and purchased by Stoddard and Hall, and the sale thereof confirmed to them on the third day of November, 1898, and is held by the Buffalo Coal & Coke Company * * * *, the land so sold and protected by the constitution being described in deed dated the 8th day of June, 1907, from W. K. Cowden, Trustee, to the Buffalo Coal & Coke Company, and being all of the land described in said deed as Tract No. 4." (See printed record page 215.)

It being agreed in the stipulations filed in this cause that Tract No. 4 described in the deed of the 8th day of June, 1907, from W. K. Cowden, Trustee, et al., to the Buffalo Coal & Coke Company, embraces the land in controversy in this suit. (See printed record, page 37.)

On the 4th day of May, 1910, a decree was entered in said cause confirming the report of Commis-

sioner in Chancery Robert Bland, and decreeing as follows:

"It appearing from said report that all of the lands described in the plaintiff's bill, except the hereinafter described six parcels (these six parcels, it is stipulated, do not embrace any of the land in controversy in this case), are not liable to sale on account of the adjudication made in the cause of the State of West Virginia against Henry C. King and others by the Supreme Court of Appeals of West Virginia, as well as upon the account of the sale thereof confirmed to Stoddard and Hall on the 3rd day of November, 1898, in the cause of the State of West Virginia against Jesse R. Irwin and others, lately pending in this court.

"It is therefore adjudged, ordered and decreed that all of the lands described in the plaintiff's bill embraced in the deed dated the 8th day of June, 1907, from W. K. Cowden, Trustee, and others, to the Buffalo Coal & Coke Company, a duly certified copy of which is filed as Exhibit No. 9 with the petition of the Buffalo Coal and Coke Company and the Altizer Coal Land Company, be and the same is hereby dismissed from this suit."

IX.

From the foregoing statement it appears that the land in controversy in this case was a part of the land in controversy in each of the three suits above mentioned, to-wit: the cause of the State of West Virginia against Jesse R. Irwin et al., including C. F. Thomas, in which the land in controversy

in this case was sold as school land and purchased by Stoddard and Hall; that in the case of the State of West Virginia against Henry C. King and others, including C. F. Thomas and U. B. Buskirk, Trustee, it was again sought to sell the land in controversy in this case under the alleged forfeiture of the 500,000 acre grant. In this case U. B. Buskirk, Trustee, successor in title of Stoddard and Hall, purchasers as aforesaid, intervened by petition, and a decree was entered in his favor dismissing the lands from the suit and adjudging that the land was not liable to be sold by the state or to be redeemed by King.

In the cause of the State of West Virginia vs. Alexander McClintock and others, including C. F. Thomas, and the Buffalo Coal & Coke Company, the land in controversy in this case was again sought to be sold as a part of the 142,000 acre DeWitt Clinton grant. In this case the Buffalo Coal & Coke Company, successors in title to Stoddard and Hall, and U. B. Buskirk, Trustee, intervened by petition, and the lands in controversy in this suit again were dismissed from the suit of the State of West Virginia against Alexander McClintock on the ground that said lands had been sold to Stoddard and Hall in the cause of the State of West Virginia against Jesse R. Irwin and others.

**LAWS OF WEST VIRGINIA ON SUBJECT
OF TAXATION SO FAR AS THEY RELATE TO
THIS SUIT.**

ARTICLE 13, SEC. 6 OF THE CONSTITUTION OF WEST VIRGINIA PROVIDES: "It shall be the duty of every owner of land to have it entered

on the land books of the county in which it or a part of it is situated, and to cause himself to be charged with the taxes thereon and pay the same. When for five successive years after the year 1869 the owner of any tract of land containing 1,000 acres or more shall not have been charged on such books with state taxes on the land, then by operation thereof the land shall be forfeited and the title thereto vested in the state. But, if for any one or more of such five years the owner shall have been charged with state taxes on any part of such land such part thereof shall not be forfeited for such cause."

And Section 39 of Chapter 31 of the Code providing, "And when for any five successive years since the 9th day of April, 1873, the owner of any tract or lot of land less in quantity than one thousand acres, shall not have been charged on such books with said taxes on said land, then by operation of law and without any proceedings therefor the land shall be forfeited and the title thereto vested in the state. But if for any one or more of said five years the owner shall have been charged with state taxes on any part of the land such part shall not be forfeited for such causes."

CHAPTER 105 CODE.

Sec. 1. LANDS SUBJECT TO SALE.— All lands in this State, waste and unappropriated, or heretofore or hereafter for any cause forfeited, or treated as forfeited, or escheated to the State of Virginia or this State, or purchased by either and become irredeemable, not redeemed, released, trans-

ferred, or otherwise disposed of, the title whereto shall remain in this State till such sale as is hereinafter mentioned be made, shall, by proceedings in the circuit court of the county in which the lands or a part thereof are situated, be sold to the highest bidder for the benefit of the school fund, in the manner hereinafter provided.

Section two of said Chapter providing for a record to be made and kept of the forfeited land.

Section three providing for the Surveyors of the Counties to make reports of the forfeited or waste and unappropriated land to the Commissioner of the School Land of the County.

Section four providing for the appointment of an officer to be known as the Commissioner of School Lands of the county, and providing for his giving bond, removal, etc.

5. "Reports of Commission to circuit court.—It shall be the duty of the commissioner of school lands of each county, to report to the circuit court of his county from time to time, and at least once in each year, a list of all tracts and parcels of land, if any, lying in whole, or in part in his county, reported to him by the auditor and surveyor as required by the second and third sections of this chapter, or which shall otherwise come to his knowledge, which in his opinion are liable to be sold for the benefit of the school fund."

6. "Suit for sale of lands.—Every such report shall be recorded in the chancery order book of said

court and filed and preserved by the clerk of said court in his office, and thereupon a suit or suits in chancery shall be commenced and prosecuted, by and in the name of the state of West Virginia for the sale of every such tract and parcel of land, so reported, as required by section four of article thirteen of the constitution of this state. All such tracts or parcels of land mentioned in any such report, not exceeding in quantity one thousand acres, may be included in one suit, but a separate suit may be brought and prosecuted for the sale of each tract of land exceeding in quantity one thousand acres; and the former owner of any such tract of land at the time of the forfeiture thereof, or the person in whose name the same is forfeited, shall, if known, be made a defendant in such suit, and all persons claiming title to or interest in any such lands, shall, also as far as known, be made defendants therein. And any person claiming an interest in any such land or in the proceeds thereof, not so made defendant, may file his petition in any such suit stating what interest he claims therein, either in open court, or before a commissioner in chancery, while the suit is pending before him, or at rules, if the case be pending at rules, and shall thereupon become a defendant therein, and may defend and protect his interest, if he has any therein, to the same extent as if he had originally been made a party defendant therein."

Sec. 7 of said chapter providing that the suits under this Chapter shall be commenced, proceeded in, heard and determined in the same manner in all respects as other suits in chancery are brought, prose-

cuted and proceeded in and subject to the same rules, etc., except as specifically changed by the chapter.

Sec. 8, providing for a reference to a commissioner in Chancery whose duty it is to determine whether or not the land proceeded against in the suit is liable to sale for the benefit of the school fund and who was required to give notice of his sittings by publishing a notice to all of the defendants, and to all unknown owners and claimants of the land for four weeks before proceeding to discharge his duty under decree of reference.

Sec. 9, providing for a hearing before the court on exceptions or objections to this Commissioner's report.

Sec. 10, providing "that upon the hearing of the report of the Commissioner in Chancery, the court shall decree a sale of the lands or any part of them therein mentioned which are subject to sale for the benefit of the school fund at public auction to the highest bidder upon such terms and conditions as in the opinion of the court will produce the greatest amount of purchase money. And the court may decree a sale of any one or more of the tracts, parcels, lots or parts of tracts or lots mentioned in the bill without waiting the determination of the suit as to the other lands mentioned therein."

Sec. 11, providing for a sale by the Commissioner of School lands in pursuance of the decree of sale provided for in Section 10.

Sec. 12, providing for the compensation to the Commissioner of school lands and his attorney.

Sec. 13, providing for the distribution of the proceeds of the sale to the state and providing for the payment of the same to the various funds to which

the taxes for which the land was sold ratably belonged, and also prohibiting the School Land Commissioner from directly or indirectly being a purchaser at said sale.

Sec. 14, providing for the annual report of the Commissioner of School land of the amount of money received by him from the sale of the land.

Sec. 15, providing for a deed to be made to the purchaser at such sale by the Commissioner of School Lands, or other commissioner appointed by the court.

This is the outline of the provisions of Chapter 105 of the Code of West Virginia with quotations of the portions in full so far as it relates to the controversy in this case.

ARGUMENT.

There are several assignments of error made in the petition for the writ in this case. So far as they are material to any inquiry that may be required to be made in this case they are all one or related to one main controlling question, that is, the admissibility in evidence of the records of the three suits of school land proceedings. In the first of which the land in controversy was sold and purchased by Stoddard & Hall, and in the others, adjudications made declaring the purchase made by Stoddard and Hall to have passed the state's title to the land in controversy to the purchasers. So far as any constitutional question could possibly be involved in this suit, it must of necessity relate to the system established by the Constitution and Statutes of West Virginia forfeiting land for the failure of the owner to have it entered on

the land books for the period of five successive years, and providing after such forfeiture for a sale in a school land proceeding, or a suit against the land by the state in which the land forfeited, or purchased by the state at a tax sale, is sold to purchasers and the state's title thus transferred from the state to the purchaser.

All possible questions in regard to the constitutional provision forfeiting land and the statutes enacted to carry that provision into effect, have been repeatedly before this court, and each time this court has held that the constitution and statute were not in violation of the Federal Constitution.

Cases in which this question has been decided are:

King vs. Mullins, 171 U. S., 404.

King vs. Panther Lumber Company, 171 U. S., 437.

Swan vs. West Virginia, 188 U. S., 739.

Fay vs. Krozier, 30 S. C. R., 568.

King vs. State of W. Va., 216 U. S., 92.

King vs. Buskirk, 231 U. S., 735.

In the last two cases above cited the identical title now in question in this case was then in litigation in this court, and all of the questions now raised and contentions now made against the validity of the title of the defendant in error to the land in controversy, was then made by King against this same title, and against Buskirk, the predecessor in title of the defendant in error. And this court in those two cases overruled the contentions then made by King and dismissed the cases for want of jurisdiction of this

court, thereby sustaining this title then owned by Buskirk, now owned by the defendant in error.

The same facts presented in each of the above cases are now the controlling facts in the case at bar. The same record of sale of this land to Stoddard and Hall was presented in each of the cases as the one presented in the case at bar, and this court after a thorough examination found no constitutional objections to the sale to Stoddard and Hall under which Buskirk then, and the defendant in error now, claims the land in controversy. This court has regarded, as appears from its opinions, *King against Mullins*, as settling the constitutionality under the Federal Constitution of the Constitution and Statutes of West Virginia forfeiting land titles, and providing a system for the transfer of the forfeited land to purchasers and others, and have dismissed all subsequent cases for want of jurisdiction, and we cannot better express our views of the assignments of error made in this case or the argument that might be made thereon, than to adopt the language of this court used in one of the cases above cited in which the title now owned by the defendant in error was in question before this court. We refer to *King vs. West Virginia*, 216 U. S., page 100.

"The whole discussion upon this point is little more than an attempt in a respectable form to re-argue by no real distinction what was decided in the former case."

It is contended that the introduction of the records of the three school land proceedings, to-wit:

State vs. Irwin; *State vs. King*; *State vs. McClintock*, deprived the plaintiffs in error of property

without due process of law. However, the plaintiffs in error failed to show any title vested in them at any time of which it was possible for them either by the introduction of those records in evidence, or otherwise, to have ever been deprived. Having no title it is not conceivable how they could be deprived of it. But if they had shown title to the property, but for these proceedings their admission in evidence is clearly justified and we will confine the remainder of this argument to a discussion of the admissibility of these records in evidence.

**PROCEEDINGS IN THE CAUSE OF THE STATE
VS. JESSE R. IRWIN, STATE AGAINST
KING AND THE STATE AGAINST McCLIN-
TOCK ARE ADMISSIBLE IN EVIDENCE.**

I.

As has heretofore been shown, C. F. Thomas was a party by name and duly served with process, as adjudicated by the records in both proceedings above styled. In each of these proceedings his claim of title was set out, the same as is shown by the record in this case, and in each of the state's bills filed in both the above proceedings, it was alleged that his title or claim of title, together with the other defendants' titles or claims of titles, were all forfeited to the state and liable to be sold for the benefit of the school fund, and the bills prayed for a sale of the land. C. F. Thomas did not appear in either of said proceedings, although he was properly before the court, as shown by the record. Others of the de-

fendants in these proceedings filed answers, the proceedings were pending in the courts of this state, and in the Supreme Court of the United States, for years. In the causes it was adjudicated that the land was forfeited, as alleged in the bills, and in the one case that King had a right to redeem the land so far as the title remained in the state, in the other case that the successors in title of Dewitt Clinton had a right to redeem the land so far as the title remained in the state. Other decrees were entered in the cause dismissing certain lands, including the land in controversy, and numerous other tracts from the proceedings, on the ground that the title had passed out of the state to and vested in other claimants. During all of these proceedings C. F. Thomas was before the court, and as much bound by the decrees entered therein as the other defendants, some of whom were actively engaged in the litigation for all these years. The decrees, however, made and entered in the case bound the one party as much as the other.

The claim of title set up by the plaintiffs in error is under C. F. Thomas, deeds being made by Thomas to Ellison and Baer, and from Ellison and Baer to the other plaintiffs in error, except James Doliver Brown, (page 265 printed record.)

We therefore contend that the defendants in error are each claimants under C. F. Thomas, and are bound by the decree in these proceedings, to-wit, the decree in the State vs. King, and State vs. McClintock, as privies in estate with C. F. Thomas, a party to said proceedings. The only attempt made to answer this contention is the inferences made in

the petition to the effect that in the petition filed by Buskirk, Trustee, in the State against King, and by the Buffalo Coal & Coke Company in State against McClintock, C. F. Thomas was not mentioned by name in said petitions. It is very apparent when you examine the record in these causes why no mention was made of C. F. Thomas in these petitions. These petitions were filed under the authority of Section 6, Chapter 105, of the Code, which allows any person not made a party to school land proceedings to intervene by petition and set up his title, and the statute provides that he shall thereupon become a party to the suit the same as if mentioned as a party in the original bill. The statute, however, does not require any process upon this petition against the plaintiff in the case, or against any of the defendants in the case, the statute simply allowing the petitioner to become a party and to defend his claim to the lands therein sought to be sold. The statute also gives the court complete jurisdiction to hear and determine all questions of title to the land sought to be sold, and makes the final decree entered therein a bar to the claim of all persons to the land. It is not the practice in these school land proceedings, when a petition is filed by one not before a party to the suit, to issue process upon this petition. It was not done in the King case or in any other case that we have examined. In the King case some four hundred or more of these petitions were filed. Process was not issued on any of them. It is contended that Buskirk mentioned King and certain other defendants in the cause in his petition. That is true, but this was only done for the purpose of answering the contentions

made by King and the title set up by King and these other defendants, in answers that had been filed in the cause before the filing of these petitions. Of course no mention was made of C. F. Thomas, because he had filed no answer or other pleading in the cause, and was not making any claim to the land other than that set up in the plaintiff's bill of complaint, as was King and these other defendants so mentioned in the petition of Buskirk, Trustee.

See State vs. Hicks, 84 S. E. Rep., 928. Pt. one of Syl.

1. "A claimant not made a party to the state's bill in a school commissioner's proceeding to sell forfeited land, who files his petition therein, as provided by section 6, c. 105, Code 1913 (Sec. 4438), is not required to make other claimants parties to his petition. Such petition may be filed in court, at rules, or before the commissioner to whom the cause is referred, and no process need issue thereon."

2. "A defendant, named in the bill in such proceeding, who is duly served with process and fails to appear, is bound by the final decree therein, and cannot have it set aside at a subsequent term, except for such errors, apparent upon the record, as would justify reversal upon appeal."

II.

If this court should hold that the proceedings in the cause of the State against King and the State

against McClintock are not binding adjudications upon the defendants in the court below, plaintiffs in error, then those proceedings are admissible in evidence as a link in the plaintiff's chain of title, under numerous decisions of Supreme Court of West Virginia hereafter cited, and are prima facie evidence of the title of the defendant in error.

In this connection we desire especially to call the court's attention to the case of *Blake vs. O'Neal* 63 W. Va., 483, opinion at page 495.

**"THE DECREE OF REDEMPTION
IS ONLY PRIMA FACIE EVIDENCE OF
PURCHASE OR FORFEITURE AS
AGAINST PERSONS NOT PARTIES TO
THE SUIT." (Capitals ours.)**

Citing

Starr vs. Sampselle, 55 W. Va., 442.
Coal Co. vs. Howell, 36 W. Va., 489.
Bennett vs. Preston, 59 W. Va., 681.

All of these cases hold that the record of proceedings in school land causes are admissible as against strangers, and are prima facie evidence against such strangers to establish a link in the chain of title, for which purpose they were used in the case at bar.

There is, however, an attempt made in the brief to distinguish between proceedings resulting in a sale of the land in a school land case and decrees of redemption on the one hand, and a decree of dismissal on the other. This court, in the case of *State*

against King, held that the decree of dismissal in that case was the same and operated as a decree of redemption, and even under the contentions made in the brief these proceedings would be admissible in evidence as a link in the plaintiff's chain of title, showing and establishing *prima facie*, at least, that the title purchased by Stoddard and Hall, although it had returned to the state for failure of Stoddard and Hall to redeem from a sale made for taxes under which the state became the purchaser, until two days after the expiration of the year allowed for redemption, was by virtue of said decree, restored to the successors in title, to-witt, Buskirk, of the said Stoddard and Hall, and it is admitted that the land in controversy in the case at bar is a part of the land mentioned and described in this decree in the *State vs. King*, which this court says operated as a decree of redemption; and that court holds in *Blake against O'Neal*, and the other cases there cited, that a decree of redemption is sufficient *prima facie* evidence to connect the plaintiff with the state, the source of title, and would be sufficient to allow the plaintiff to recover in an action of ejectment, if no evidence was introduced in rebuttal. In the case at bar nothing was introduced by the defendants attempting to rebut the effect of this decree of redemption or dismissal; therefore, upon the strength of that decree alone, the judgment of the court below should be sustained under all of the decisions of this court.

It is contended that the land in controversy in this case is within the exterior lines of the Dewitt Clinton 142,000 acre inclusive grant, in which 40,000 acres of exclusions were made for prior claims. The

record in the cause of the State of West Virginia against Alexander McClintock and others answers this contention by an adjudication binding upon the state, and at least prima facie evidence against the plaintiffs in error in this case. It is shown by the record in said cause, and admitted by the stipulations in the case at bar, that the Dewitt Clinton grant of 142,000 acres was forfeited and the title thereto vested in the state; that these proceedings were brought to sell this grant, and that pending these proceedings a decree was entered adjudicating that the land in controversy was not liable to sale or redemption in said cause, and the land dismissed from said suit on the petition and motion of the predecessors in title of the defendants in error.

This decree is clearly admissible in evidence as a link in the plaintiff's chain of title, and is prima facie evidence at least against the plaintiffs in error in this cause, and if the land in controversy in the case at bar was within the Dewitt Clinton 142,000 acres and the title to said grant was vested in the state, this decree of dismissal passed that title, to-wit, the title of the state, to the predecessors in title of the defendants in error. It could not be contended that this decree would not be an estoppel against the state, and that it would not operate to pass the state's title by virtue of the estoppel. Then whatever title, if any, the state had to the land under the Dewitt Clinton grant, would pass by this decree, and the defendants in error, plaintiffs below, could have recovered upon this decree as showing prima facie a title within them, without further introduction of testimony in the case at bar.

In this connection we desire to call the court's

attention to the distinction between proceedings instituted by the state to sell land under Chapter 105 of the Code, as belonging to it and liable to sale for the benefit of the school fund, and ordinary decrees between private litigants in chancery causes.

The state is the source of all title to real estate. In an action of ejectment it is necessary to establish a title emanating from the state, unless the parties claim under a common source of title or under a title acquired by adverse possession for the statutory period. In ordinary cases this is done by simply showing a grant from the state by letters patent, following this by a chain of title connecting the patentee with the plaintiff in ejectment. With this patent or grant the defendant in the action of ejectment is in no way connected, he is not a party to it, he is not claiming under it, or under any person who does claim under it. The question might then be asked: Why is it admissible in evidence against him? The answer is simple: It shows the passing of the state's title to the patentee. It is necessary for the plaintiff to introduce this patent in order to connect himself with the state, as he must show a title from the state. Having shown a title from the state, he has made a *prima facie* case. The defendant may rebut this case by showing a prior grant, a forfeiture, a sale of the land embraced in the plaintiff's grant, or he may show a title by adverse possession; but until he makes some showing the plaintiff, having connected with the state, has made a *prima facie* case, which entitles him to recover the land in controversy. This is true where you claim under a patent. The Constitution of the State of West Virginia of 1872 abolished these patents, or grants for land, and substituted in

the place thereof, and as a means of passing the state's title to private owners, the school land proceedings found in Chapter 105 of the Code. It directed that instead of the grant being issued for the state's lands to persons, the lands should be sold in a chancery proceeding under this chapter, and that the purchaser would acquire title from the state by purchase at the sale made under these proceedings the same as he would acquire a title from the state made under the patent as provided in the law prior to the adoption of this constitution. As has been stated, under the old law the patent was admissible in evidence against a stranger, and as against a stranger *prima facie* evidence of title passing from the state to the grantee therein. Of necessity the substitute provided for by the constitution and statute must be likewise admissible in evidence against strangers thereto, and *prima facie* evidence against them of the passing of the state's title from the state to claimants under these school land proceedings. If such were not the case, then it would be impossible for a person claiming land under a school land proceeding to recover in an action of ejectment against an adverse claimant unless such adverse claimant happened to be, which is not often the case, a party to the school land proceedings in which the land was sold. These proceedings, however, when introduced against a person not a party or privy to said school land proceedings, is like the patent, of course, only *prima facie* evidence of the passing of the state's title from the state to the person claiming under these proceedings, and a stranger to the proceedings can raise the same question, which he could raise against the patent, that is, he could show a prior

grant, that he was a purchaser in a prior school land proceedings, that he had acquired the state's title by transfer under the constitution, or title by adverse possession; but after the proceedings are introduced in evidence, even against a stranger, and where they show the passing of the state's title, either by purchase, redemption or estoppel from the state to the party who introduces them, they stand as the patent would stand, and make a prima facie case entitling the plaintiff to recover the land until such case is rebutted by the defendants. This is true whether the proceedings resulted in a sale and the person introducing the proceedings was the purchaser, or where the proceedings resulted in a redemption and the person introducing the proceedings claims under the redemption thus made, or where the proceedings resulted in the dismissal of the land from the school land proceedings, and the person introducing the proceedings claims under the party in whose favor the land was dismissed. In either case, the proceedings establish a prima facie case of the passing of the state's title from the state to the person in whose favor the decree was entered.

As has been stated, these are statutory proceedings enacted to carry out the provisions of the constitution of 1872. These decrees are decrees provided by the statute, the statute providing for each of these decrees, Section 11 of said chapter providing for the decree termed the decree of sale and the confirmation thereof, Section 16 of said chapter providing for the decree of redemption, and section 6 of said chapter providing for the decree of dismissal, in the following language.

"Any person claiming an interest in such land or in the proceeds thereof, not so made defendant, may file his petition in any such suit, stating what interest he claims therein, either in open court or before a commissioner in chancery while the suit is pending before him, or at rules if the case be pending at rules, and shall thereupon become a defendant therein, and may defend and protect his interest, if he has any therein, to the same extent as if he had originally been made a party defendant therein. Any tract or parcel of land which has been heretofore forfeited, or treated as forfeited, waste and unappropriated, or escheated to the state of Virginia or this state, and which has been sold and conveyed as such under such decree or order of the circuit court in any suit or proceedings under Chapter 105 of the Code, or other act at any time since 1872, or which any instrument executed under said decree or order purports to convey, shall not again be proceeded against or sold in any suit or proceedings now pending or hereafter brought under said chapter, or otherwise, unless since the execution of such conveyance or instrument such tract or parcel of land has been forfeited for the non-payment of taxes charged or chargeable thereon since such conveyance or instrument in the name of the purchaser thereof, his heirs, devisees or assigns * * *".

and upon proof being made in the manner provided in this section that the land involved in said school

land proceedings had been previously sold or transferred under the constitution, this section provides as follows:

"The court shall thereupon enter an order dismissing the suit as to any such parcel or tract of land, and proceed no further against the same."

This is the decree of dismissal referred to in this brief. It is the decree of dismissal by which the land in controversy in the case at bar was dismissed from each of the proceedings under this chapter, brought by the state and styled State against King and State against McClintock; and, speaking of the decree entered in the cause of the State against King the Circuit Court of Appeals of the United States, in King vs. Buskirk, 196 Fed., 299, says:

"Under Code W. Va., 1900, Chapter 105, Sections 6 and 19, which authorizes persons claiming an interest to intervene by petition and become a party to a suit by the state for the sale of land forfeited for the non-payment of taxes, giving the court jurisdiction to determine all questions of title, and providing that if it shall be found that any part of the land in question has been sold by the state the bill shall be dismissed as to such land, and decree in such suit adjudicating that certain land had been previously sold to a petitioner, is conclusive as to his title against the rights of the defendants to redeem such land."

This decision was approved by this court, King vs. Buskirk, 231 U. S., 735.

In the recent case of the Hector Coal Land Company against Jones and others, recently decided by the Supreme Court of West Virginia, a portion of the land embraced in the Stoddard and Hall purchase in the Irwin case, was in litigation between the Hector Coal Land Company claiming exactly the same title as the defendant in error, and the same H. C. Jones and others claiming exactly the same title as the plaintiffs in error. This case was recently decided by the Supreme Court of West Virginia and we are having a copy of that opinion printed as an appendix to this brief.

This last decision, together with the decisions of this court hereinbefore cited, so conclusively dispose of all the questions raised by the plaintiffs in error in their assignments of error that further discussion, in fact any discussion of them is entirely unnecessary, and we submit that this case should be dismissed for want of jurisdiction.

Respectfully submitted,

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No. 3134.

HECTOR COAL LAND CO. v. JONES ET AL.

LOGAN COUNTY JUDGMENT AFFIRMED
LYNCH, PRESIDENT

SYLLABUS

1. A recital in a decree that process has been "regularly executed and served upon defendants", or that "all the defendants have had notice of the proceeding either by personal service or by an order of publication duly posted and published as required by law", operates as a judicial ascertainment that the court has jurisdiction of the subject matter of the suit.

2. Whatever right, title, estate or interest in land an individual purchaser at a sheriff's tax sale would acquire under the curative provisions of section 25, chapter 31, Code, vests in the state when a purchaser thereat, with like effect, without a deed or other conveyance therefor, subject only to the right of redemption granted by section 33 of that chapter.

3. When necessary to re-enforce a *prima facie* title to real estate acquired under decrees of sale and confirmation entered in a suit prosecuted in the name of the state under chapter 105 of the Code to sell land forfeited for non-entry and non-payment of taxes thereon, a plaintiff in ejectment may introduce parts of the records of other similar proceedings brought to condemn the same land to sale as for-

feited for like omissions charged against other claimants thereof, to which proceedings they and his predecessors in title either originally were or thereafter by petition became parties defendant.

4. If by a witness whose familiarity with the land conveyed by an inclusive deed or grant qualifies him to locate with reasonable certainty the exceptions and reservations therein contained, a plaintiff in ejectment proves in general terms that no part of the land in controversy is within the parts excepted or reserved, he thereby makes a sufficient **prima facie** case of location outside thereof, under the rule as to the burden of proof in such cases, and, when not controverted by rebuttal testimony, he is not required to identify the exceptions by proving the location of the boundaries thereof.

LYNCH, President:

The Hector Coal Land Company, under a claim of title, brought ejectment, and on a directed verdict obtained the judgment by the defendants charged to be erroneous, finding for the plaintiff a fee simple title to the 2149 acres sued for and awarding to it the possession thereof. Since by their chief contention they deny plaintiff proved title to the land in controversy, it becomes necessary to determine from the evidence whether plaintiff actually is entitled to the possession of the land it claims.

In a school land proceeding in the circuit court of Wyoming county against 480,000 acre Morris grant to sell the same as forfeited for non-assessment and non-payment of taxes, by decree in 1885, 40,000 acres thereof, of which 20,000 acres was

located in Logan county, were adjudged to be so forfeited and directed to be sold, and purchased by Jesse R. Irwin, to whom, upon confirmation by a decree entered in the cause, W. B. McClure, commissioner of school lands, as thereby directed, conveyed the land March 25, 1886. Out of the 20,000 acres located in Logan county, the grantee conveyed in the same year an undivided one-fourth interest to each of the following named persons: C. F. Thomas, Alvin Irwin and Harris Hoyt. Jesse R. Irwin and such grantees (except Thomas), the wife of each joining, conveyed to Emma Idelia Pomeroy the 20,000 acre tract June 28, 1893. In the stipulation signed by counsel representing the parties to this litigation, it is admitted that the land claimed by plaintiff lies within the exterior boundaries of that tract. The deed therefor Mrs. Pomeroy caused to be recorded and the lands entered in 1894 for taxation on the land books of Logan County. As the taxes assessed against her grantors for the year 1893, and to her for the next succeeding year, were not paid, the tract was returned delinquent for those years in the names of the grantors and grantee, and by the sheriff sold to the state, for want of other bidders, at a tax sale made pursuant to the provisions of chapter 31 of the Code to enforce the statutory tax lien, neither she nor her grantors having in the meantime availed themselves of the privilege of redemption accorded by the chapter; and, as they continued in default, the auditor certified the tract to the commissioner of school lands of Logan county to be proceeded against as required by chapter 105, at the suit of the state against the former owners and claimants of the land.

In a suit brought and prosecuted, as directed, against Jesse R. Irwin and his grantees of undivided interests therein, including C. F. Thomas and Mrs. Pomeroy, the land was sold as forfeited to the state, and purchased by Stoddard and Hall, to whom upon confirmation of the sale the title was conveyed by Wilkinson as commissioner November 12, 1898. This title, through successive mesne conveyances, one of the deeds being by U. B. Buskirk in his own right and as trustee, finally vested in the plaintiff herein. If to Stoddard and Hall the decrees and deed in the Irwin suit transferred the fee simple title to the acreage so purchased, and they and their vendees have regularly paid the taxes chargeable thereto, and if as agreed the land in controversy in this action is a part of that acreage, **prima facie** plaintiff acquired and at the institution of this action had a title sufficient to sustain ejectment.

Pursuant to the stipulations of the parties, plaintiff to re-enforce its **prima facie** title, either as links in the chain thereof or as former adjudications binding C. F. Thomas, through whom defendants in part trace their claim to the land in controversy, was permitted to introduce, subject to exception for want of relevancy or competency, parts of the records in three school land proceedings brought in the name of the State of West Virginia, as then required by chapter 105 of the Code, against the Irwins and others, against Henry C. King and others, and against Alexander McClintock and others. The propriety and effect of the introduction of these exhibits are challenged by defendants as incompetent

and ineffective for either purpose intended by plaintiff or for any other legitimate purpose.

First, it is argued that the papers admitted in evidence do not sufficiently show that C. F. Thomas was a party served with process in any of the suits brought by the state to sell lands forfeited for non-entry for taxation and non-payment of taxes charged against them in the names of the prior owners. That Thomas was a party defendant in the suit of the state against Jesse R. Irwin and others, and was served with process, clearly appears from the caption of the bill, from service of process accepted for him by Jesse R. Irwin as "agent and attorney in fact", and from recitals in the decree that process had been "regularly executed and served upon the defendants", including Thomas by name. He was a party defendant to the fourth amended bill in the suit of the state against Henry C. King and others; and it appears from the stipulation of the parties herein that the King suit "was matured for hearing by entering, publishing and posting of the proper order of publication as to all parties mentioned in the fourth amended bill". That he was a party defendant and duly served in the suit of the state against Alexander McClintock and others appears from the caption of the bill therein and the recitals in the decree entered September 9, 1893, that all the defendants had notice of the proceeding either by personal service or by an order of publication duly posted and published as required by law. Whatever may be the general rule, certainly, when not controverted except by an indefinite assertion, recitals of this character in a decree of the court having jur-

isdiction of the subject matter of the controversy are either presumed to be true or treated as conclusive upon the question of the service of process and the entry and execution of an order of publication. *Craig v. Sibsell*, 9 Gratt. 131; *Moore v. Holt*, 10 Gratt. 284; *Arnold v. Arnold*, 11 W. Va. 449; *Central District & Printing Telegraph Co. v. Parkersburg & Ohio Valley Electric Railway Co.*, 76 W. Va. 120.

The land, the title to which is the subject matter of this contest, is wholly within one or partially within more than one of the three enclosures of large boundaries of land granted by the commonwealth of Virginia in 1795 and 1796, namely, either a tract of 500,000 acres or one of 480,000 acres granted to Robert Morris and 142,000 acres granted to DeWitt Clinton. Some part or all of each of these several tracts were proceeded against as forfeited in the three suits prosecuted by the state against Jesse R. Irwin and others, Henry C. King and others, and Alexander McClintock and others; the first suit involving the 480,000 acre grant, the second the 500,000 acre grant, and the third the 142,000 acre grant.

In the Irwin suit, as already observed, Jesse R. Irwin acquired title by the McClure deed to 20,000 acres located in Logan county. That title passed to Emma Idelia Pomeroy by the deed of July 28, 1893, and remains vested in the plaintiff here. In one of the exhibits by plaintiff introduced in evidence is a recital of an interference or interlock to the extent of one thousand acres between the tract sold to Mrs. Pomeroy by the Irwins and Hoyts and the DeWitt

Clinton survey. The exact situs of the interlock is not disclosed.

The fourth amended bill of the state in the King suit alleged that the title to the 500,000 acre grant, situated in part in Logan county, had theretofore vested in the state because omitted from the land books of each of the counties in which it is located and the failure of the owners thereof to pay any taxes thereon for twelve years next succeeding the year 1883, wherefore it had become liable to be sold by the state for the benefit of the school fund. To this bill Jesse R. Irwin, Harris Hoyt, the heirs of Alvin Irwin, C. F. Thomas and others were named defendants; and against them it is alleged that they claim title to some part of the 480,000 acre grant, and that between the two grants to Morris there is an overlap or interlock, but to what extent is not alleged. To this amended bill appeared by petition, as allowed by sections 16 and 17, chapter 105, Code, Stoddard and Hall, U. B. Buskirk as trustee and in his own right, Alexander McClintock, and numerous other claimants of some parts of the land proceeded against as forfeited. McClintock claimed to be the sole owner of the DeWitt Clinton 142,000 acres under conveyances regularly derived from the patentee, and that he and others whom he named have an interest in the 500,000 acre Morris grant. He therein admits the forfeiture of the DeWitt Clinton tract, and prays leave to redeem it from the forfeiture, but contests the right claimed by King to redeem the Morris 500,000 acre grant.

In their petition filed in the King suit, Stoddard and Hall set up the title acquired by them through

the proceedings in the Irwin suit to the 20,000 acres known as the Pomeroy lands. They also by denial put in issue the verity of the claim of King set up in his answer to the fourth amended bill, that the 500,000 grant overlaps any part of the 20,000 acres claimed by them and that he has any claim to that tract. But they do allege that tract is part of the 480,000 Morris grant, to the part of which conveyed to them by Wilkinson they assert title. After alleging therein the conveyances by Jesse R. Irwin to C. F. Thomas, Harris Hoyt and Alvin Irwin of an undivided one-fourth interest each in the 20,000 acres conveyed to him by W. B. McClure, they charge that the delinquent tax sale of the 20,000 acres in 1895 by the sheriff of Logan county vested in the state the entire title held by the grantees of Jesse R. Irwin, including the one-fourth interest claimed by C. F. Thomas. Pursuant to the prayer of the petition, by the decree of 1908 King was denied the right of redemption and the Hall and Stoddard tract was dismissed from that suit.

In the McClintock suit, instituted for the purpose of selling as forfeited the DeWitt Clinton grant, the Buffalo Coal & Coke Company and Altizer Coal Land Company, as grantees of the Stoddard and Hall title, intervened by petition, and moved the dismissal of the Pomeroy tract from that suit. The commissioner to whom the cause was referred reported, as directed by the court that the title of the petitioners to the 20,000 acre tract was protected by §3, art. 13 of the constitution, and the dismissal of the tract from the King suit because not liable to sale for the benefit of the school fund or to redemp-

tion by King. This report a decree entered in 1910 "approved and confirmed, there being no exceptions or objections" thereto; and the court, "perceiving no just grounds of exception", decreed that none of the lands described in the bill, with certain exceptions not important to notice, were liable to sale, on account of the adjudication made in the King suit by this court, "as well as on account of the sale thereof confirmed to Stoddard and Hall on the 3rd day of November, 1898" in the Irwin suit, "and the same are hereby dismissed from this suit".

As by §25, ch. 31, Code, in a purchaser at a tax sale under that chapter, who has obtained and caused a deed to be admitted to record, vests "such right, title and interest in and to such real estate as was vested in the person or persons charged with the taxes thereon for which it was sold, at the commencement of or at any time during the year or years for which such taxes were assessed, and all such right, title and interest therein of any other person or persons having title thereto who have not in his or their own name been charged on the land books of the proper county or assessment district with the taxes chargeable on such real estate for the year or years for the taxes of which the same was sold, and have actually paid the same as required by law, shall be transferred to and vested in the grantee, notwithstanding any irregularity in the proceedings under which the same was sold not herein provided for", and as by the same section it is provided further "that when there are more than one such owner of such real estate or persons charged with taxes thereon who are cotenants thereof or other-

wise jointly interested therein, if the same be charged with taxes to one of them alone or one or more of them and others without naming the others, such right, title, interest and estate as was vested in all or any or either of them shall pass to and be vested in the grantee in such deed", and likewise as to the heirs or devisees of a decedent, so by section 32 the like right, title, interest and estate passes to and vests in the state when a purchaser at a delinquent tax sale, without the intervention of a deed therefor, and from her to a purchaser under decrees in school land proceedings authorized and prosecuted under the provisions of chapter 105, Code. These ample curative provisions, supplemented as they are by sections 6 and 19 of chapter 105, as interpreted in *State v. King*, 546 and 610, *State v. Mathews*, 68 W. Va., 89, and *State v. Rohrbough*, 74 W. Va. 285, vested in the purchasers in the Irwin suit all the right and title of the state in the Pomeroy tract, however derived or claimed, whether by escheat, delinquency or forfeiture, notwithstanding any irregularity or error in such proceeding, or informality in the sale or conveyance therein, or any want of jurisdiction in the court to decree the sale; and by section 19 "such sales and conveyances and purported conveyances" made prior to its enactment in 1905 are "confirmed and made good and valid".

Subject only to the right to redeem within the period prescribed by law, the state by its purchase at the sheriff's sale in 1895 acquired the title to the 20,000 acres acquit of any prior right or claim thereto, from whatever source derived, not redeemed or redeemable under the provisions of chapters 31

and 105. That title the state passed to Stoddard and Hall, and they to the plaintiff. Their title in that tract thereby was clothed with superiority over the claim of any prior owner, and of any subsequent claimant except through a delinquency or forfeiture chargeable to them or their successors in title. The sale and deed to the purchasers under the decrees in the Irwin suit estop the state to reflect doubt upon the title she has granted. *State v. Mathews*, 68 W. Va., 89. Even should the 20,000 acres again become liable to sale, because of subsequent forfeiture, the owner in whose name the forfeiture occurred would still have the preferential right of redemption as between himself and those not in privity with him, except where the title is transferred under section 3, Art. 13 of the constitution. This preference necessarily is predicated upon the well sustained theory that a decree and sale in such a proceeding give birth to a new title as of a patent or grant by the state. *State vs. King*, *supra*.

Upon this theory, these exhibits were not improperly admitted; and if it be conceded that they do not strengthen plaintiff's right to a recovery, they do not operate to the prejudice of the defendants. For if it be true, as they contend, that the 20,000 acres became delinquent in the name of Buskirk, the dismissal of the tract out of the King and McClintock suits ratified and confirmed the attempted exercise of the preferential right of redemption, thereby held to be sufficient.

What has been said also answers the contention of the defendants that the deed by Wilkinson to Stoddard and Hall, directed to be executed to them by the

decree in the Irwin suit, is void and ineffectual to pass any title for failure to identify the land sold therein, because the description follows the calls of the Morris 480,000 acre grant, not the calls of the Irwin and Hoyt deed to Mrs. Pomeroy. This contention was urged also in *State v. King*, 64 W. Va., 610, as to the same deed; and it was there held that it was not the deed but the decrees of the court directing and confirming the sale in the Irwin suit, that defines the land conveyed. What was decreed to be sold, not what was granted, is determinative and definitive of the tract sold and purchased and intended to be conveyed. The opinion expressly states, what is pertinent here: "The Wilkinson deed may be said to be irregular and to an extent inconsistent with the proceedings upon which it is based. Most clearly the land sold to Stoddard and Hall by Hinchman, commissioner of school lands, pursuant to the proceedings aforesaid, was the 20,000 acres which had been conveyed to Mrs. Pomeroy. The record of the proceedings makes it clear that Stoddard and Hall purchased thereunder the land conveyed to Mrs. Pomeroy". Obviously therein was adjudicated the sufficiency and competency of the same deed to pass the title to the same tract of land. The whole or such parts of the record of proceedings for the sale of school lands as may be sufficient for the purpose, together with the deed made in pursuance thereof, should be looked to when necessary to identify the land sold and as evidence that the title of the state to such land vested in the grantee. *Feder v. Hager*, 69 W. Va., 160.

Although by defendants apparently deemed

pertinent to this inquiry, *Beatty v. Edgell*, 75 W. Va., 252, and *Crawford v. Workman*, 64 W. Va., 10, we think are not decisive of the question of the sufficiency of the Wilkinson deed. In the *Beatty* case no decree or paper identified the land. The *Crawford* case merely denied the prayer for specific enforcement of a contract for the sale of real estate, impossible of identification because indefinitely described in the contract, conformably with the doctrine usually applied in such cases.

The decree in the *King* case accepted as sufficient, although unduly delayed, *Buskirk's* effort to redeem from delinquency by payment of the taxes in arrears while the land was under the control of the auditor, and dismissed the 20,000 out of that suit. The sufficiency of that payment, the delinquency of the land, and the right of redemption were or could have been contested between *Buskirk* and any other claimant who was a party thereto and duly served with proper process, or injected themselves into the controversy by petitions filed under the authority of sections 16 and 17, chapter 105, Code. Nor was it necessary, as contended, that *Buskirk* should make other claimants parties to his petition in the *King* suit. *State v. Hicks*, 75 W. Va., 767.

The defendants, to justify their retention of possession of the land claimed by the plaintiff, introduced two deeds by *Jesse R. Irwin* to *C. F. Thomas* dated March 25 and August 21, 1886, for undivided fourth interests in the 20,000 acres covered by the *Pomeroy* deed. They trace their title to no other source. Nor was it necessary they should show any title, agreeably to the well established rule that the

plaintiff in ejectment must rely on the strength of his own title, and not on the infirmity of the adversary title. These deeds, however, are significant, when viewed in the light reflected by the certificate of the auditor and the records of the school land proceedings introduced in evidence; from the first of which it appears that neither Thomas nor any of the defendants who claim in privity with John W. Hall, deceased, were charged with taxes on any land in his or their names in Triadelphia district, Logan county, wherein the Pomeroy tract is located; and from the second, that Thomas was a party in each of the school land proceedings.

The objection as to the admissibility of the contradicted testimony of the witness Sell, introduced by the plaintiff to locate the exclusions in the 500,000 acre grant and junior claims protected by the constitution and laws of the state in the Pomeroy 20,000 acres, is answered fully by the eighteenth point of the syllabus in *Winding Gulf Colliery Co. v. Campbell*, 72 W. Va., 449, holding competent such evidence to establish *prima facie* the location of exceptions and reservations outside of the land in controversy, by proving in a general way that none of the exceptions is within the bounds of the land sued for.

While perhaps it may be true, as defendants contend, that the plaintiff's right to a recovery was a question for jury determination upon proper instructions, not by court direction, yet if the facts proved would have required an affirmative verdict the direction was not erroneous. The admission that the disputed area is within the Pomeroy tract, the

title to which, as we have seen, clearly vested in the plaintiff through Stoddard and Hall, U. B. Buskirk, in his own right and as trustee being an intermediary, without default as to non-entry and non-payment of taxes, or upon a default later cured by compliance with the state tax laws and judicially approved, excludes the conclusion that error clearly appears in the judgment complained of and that it ought to be reversed and a new trial awarded. We think no such excess of authority on the part of the trial court appears as warrants interference with the judgment rendered, and hence affirm it.

Office Supreme Court, U. S.

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JAMES D. MAHER

BRIEF FOR PLAINTIFF IN ERROR IN OPPOSITION TO MOTION

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No.

293

H. C. JONES, EXECUTOR; JAMES DOLLIVER BROWN,
ET AL., PLAINTIFFS IN ERROR.

vs.

BUFFALO CREEK COAL & COKE COMPANY, DE-
FENDANT IN ERROR.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF WEST VIRGINIA.

ON MOTION TO DISMISS OR AFFIRM.

Raymond L. Miles.

For Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 735.

H. C. JONES, EXECUTOR; JAMES DOLLIVER BROWN,
ET AL., PLAINTIFFS IN ERROR.

vs.

BUFFALO CREEK COAL & COKE COMPANY, DE-
FENDANT IN ERROR.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF WEST VIRGINIA.

ON MOTION TO DISMISS OR AFFIRM.

BRIEF FOR PLAINTIFF IN ERROR IN OPPOSITION TO MOTION.

STATEMENT OF THE CASE.

The defendant in error, plaintiff below, in advance of
the hearing of this cause, moves to dismiss the writ for

want of jurisdiction, or to affirm the judgment because, as counsel say, the questions upon which the decision depends are so frivolous as to need no argument. Counsel then refute this proposition by entering upon an elaborate statement and argument of about seventy pages, from which it appears that it is necessary to go into the merits of the case, in order to determine the question, and hence their motion will not be entertained at this time, and from which it also appears that they have totally misapprehended the character of the questions upon which the jurisdiction of this court is invoked. A brief statement of the case in supplementation and correction of the statement made by counsel for defendant in error may be helpful.

The defendant in error, which will hereinafter be referred to as plaintiff, brought its bill against the defendants to remove the alleged cloud cast by sundry deeds under which the defendants claim upon the pretended title of the plaintiff to about 2166 acres of land, but, the proof disclosing that the defendants were in the actual possession of the lands claimed by them respectively, and that the plaintiff was out of possession, the jurisdiction in equity was defeated, and the suit was recast into an action of ejectment.

The plaintiff relied for title upon two deeds, one made by Jesse R. Irwin, Marie E. Hoyt and husband, and Alvin Irwin and wife to Emma I. Pomeroy (R-38), which embraces the land in controversy within its boundaries, together with some 40,000 acres more, but gave no title to any land whatever, the purported grantors having neither title, color of title or possession, and any pretense or claim that they had having long theretofore been forfeited to the State and having never been redeemed; the other,

a deed from J. B. Wilkinson, special commissioner, to W. H. Stoddard and Amos C. Hall (R-60), issued in school land proceedings of *State vs. Irwin, et als.*, which, but for objections not material here, would pass title to some land but not to the land in controversy, it not being embraced within the boundaries of said deed when located by its established lines, corner trees and abutting older grants, although, if located by course and distance only from the beginning corner and in disregard of such actual natural and marked boundaries, it would embrace the land in controversy, and many thousands of acres more. The two deeds have no line or corner in common. This latter deed is the only one in any way connecting with the State or with any person having title to any land whatever. In fact, this "Pomeroy deed" was not introduced as passing title but for the professed purpose of identifying the land which plaintiff contended was conveyed, but which was not conveyed, by the "Wilkinson deed."

Conscious of the fact that the Pomeroy deed, while embracing the land claimed by plaintiff, gave no title and that the Wilkinson deed, while perhaps passing title to some land, did not in fact embrace or pass title to the land in controversy, the plaintiff, with a view to showing, as plaintiff contended, that it had been adjudicated that the land claimed by plaintiff was embraced in the Wilkinson deed, or at least in the sale by the State therein referred to, introduced in evidence the record of the chancery causes *State of West Virginia vs. King et als.* (R-70 *et seq.*), and the *State of West Virginia vs. McClintock et als.* (R-144 *et seq.*) in addition to the record of *State vs. Irwin*, (R-40 *et seq.*), in which latter case the said Wilkinson deed was issued.

The record in *State vs. Irwin*, but for objection proper to be considered upon the hearing, but which presents no constitutional question, would be admissible as a link in the chain of title to whatever land was conveyed by the *Wilkinson* deed or the said proceedings; but to the extent that it was offered as an adjudication binding upon any of the defendants, it was objectionable upon constitutional grounds. The plaintiff having acquired no title through or by *State vs. King* or *State vs. McClintock*, the records of these causes are inadmissible for any purpose and upon any ground, and especially for the purpose of showing an adjudication of any fact or question as against the defendants below, these plaintiffs in error, as indicated by, and for the reasons shown in, the objections interposed at the time.

These objections, as to the admission of *State vs. King* are thus stated:

To the introduction or consideration in evidence of each and every of which said bills, answers, petitions, decrees and other proceedings from said cause of *State of West Virginia vs. Henry C. King and others*, the defendants, by counsel, objected, upon the ground that the same were, and that each of them was irrelevant, immaterial and incompetent, because the defendants in this cause were not parties to said cause and did not derive or claim any title from the said *Henry C. King* or the said *U. B. Buskirk*, trustees, or his associates, nor from the State since the institution of said suit, and were not named as parties to said petition of *Buskirk*, trustee, and others, and said decree and proceedings did not attempt to confer any title upon said *Buskirk* or his associates, under whom the plaintiff in this cause claims title; and if the said decrees or proceedings be treated as adjudicating any question relating to the title or rights of these defendants, the said decrees and proceedings and the State, in

whose name the same were had, to that extent deprive the defendants or property without due process of law, in contravention of the provisions of Section 1 of Article 14 of the Amendments of the Constitution of the United States; and the giving of effect to said proceedings or decrees against said defendants in this cause by the court would deprive them of property without due process of law in contravention of Article 5 of the Amendments of the Constitution of the United States. (R-142).

And to the admission of the record of the State vs. McClintock, the objections are stated thus:

To the introduction and admission of which several decrees, pleadings and proceedings in said cause of State of West Virginia vs. Alexander McClintock and others defendants, by counsel, objected, for the reason that said documents are, and that each of them is, irrelevant and immaterial and incompetent. The plaintiff does not derive title to the land in controversy from said decrees, these defendants were not parties and are not privies to said decrees, petitions, bills and answers, and the recitals, allegations, admissions, denials, and adjudications therein are not admissible as evidence against these defendants; and to the extent that the said decrees and proceedings in said cause appear to bind or are held to bind these defendants and affect their rights herein, the same are wanting in due process of law, and contravene Section 1 of Article 14 of the Amendments of the Constitution of the United States, and their admission in evidence in this cause by this court would contravene Article 5 of the Amendments of the said Constitution; which objection the court overruled, and admitted said several papers, and proceedings to be received in evidence and read to the jury. (R-221).

State vs. King and others was brought for the purpose of selling as forfeited to the State the Robert Morris

500,000 acre grant, and State vs. McClintock to sell for like cause the DeWit Clinton 142,000 acre grant. Numerous persons were made defendants in both of these cases, and others made themselves such, but from first to last not one of these plaintiffs in error was named in or notified of either of these proceedings, and, except I. P. Baer, had no kind of privity or connection with the cases or with State vs. Irwin, or with any party thereto. One C. F. Thomas was named in the bill in each of the cases, but the only connection with him shown by the record of this cause is that created by deed to J. B. Ellison and I. P. Baer, introduced after plaintiff had rested (R-265). Ellison died before the institution of this suit. Thomas was named a defendant in this case but did not appear, and there was no issue or trial as to him, and he is not a party hereto.

The plaintiff below claimed title under U. B. Buskirk, trustee, and his associates, who filed a petition in State vs. King, (R-87), and the whole controversy therein was between them and King; Buskirk, trustee, seeking a dismissal of the suit and of King's petition so far as they affected the land claimed by him. He did not come into the case to get title, but claimed that he already had title, and set out various alleged grounds for dismissal. The petition was specifically aimed at sundry persons, these plaintiffs in error being none of them, and prayed a dismissal as to the land claimed by the petitioners; and the decree ultimately entered and upon which the plaintiff relies (R-132) merely dismissed the State's bill and King's petition (R-135, R-141). No fact or question is specifically adjudged or determined in terms by the decree, nor was any evidence introduced for the purpose of showing what was in fact adjudged or upon what ground

the dismissal was based, and it is impossible to ascertain from the record of that or this cause; but the District Court treated this decree and the similar decree in *State vs. McClintock* as in some way adjudicating and setting, as against the defendants, (these plaintiffs in error) the question of title and the identity of the land sold in *State vs. Irwin* with that claimed by the plaintiff in its declaration.

The plaintiff, Buffalo Creek Coal & Coke Company, claimed under Buffalo Coal & Coke Company and Altizer Coal Land Company, which in turn claimed through Buskirk, and which filed in *State vs. McClintock* a joint petition (R-182), and secured a decree of dismissal (R-220), similar in effect to the one entered in *State vs. King*.

At the conclusion of plaintiff's evidence, the defendants moved to strike out the same because said evidence did not tend to show any title in the plaintiff, and for the reasons urged against its admission, including the constitutional objections, but the court overruled said motion. (R-233).

The plaintiff contended that the land sold to Stoddard and Hall was the "Pomeroy land," but the deed from Wilkinson to them, the only one in this record which passed title to any thing, declared that the land sold was the land conveyed by said deed and was part of the land conveyed in another school land proceeding by Commissioner McClure to Irwin (R-255); and each of these deeds declares that the land sold and conveyed by it is a part of the 480,000 acres granted to Morris.

For the purpose of showing the location of the land affected by the last named grant (R-234), and the deed from McClure to Irwin, and the deed from Wilkinson to

Stoddard and Hall, the defendants introduced the witness W. D. Sell (R-238), who had surveyed many of the lines of the 480,000 acre tract, called for in the last mentioned deeds, and had found still standing in 1895 the original marked corner trees of several lines of said 480,000 acre grant and of the older 320,000 acre grant, therein called for as a boundary; and the testimony of said Sell, which was in no manner disputed or countervailed, showed conclusively that the land in controversy is not embraced in the exterior boundaries of the deed to Stoddard and Hall, or in the deed and grant to which it refers and whose boundaries it adopts.

The deed from Wilkinson, commissioner, to Stoddard and Hall excepted any interlock that there might be between said deed and the DeWit Clinton survey of 142,000 (R-61). The commissioner's notice of sale, (R-55), and his report of sale (R-57) and the decree confirming sale and directing deed to be made (R-58), contained the like reservation and exception. Furthermore, instead of selling the "Pomeroy land," as plaintiff contended, the notice and report of sale make no reference to the Pomeroy deed, but offer for sale and ~~sell~~ land which was forfeited in the name of Alvin Irwin and Marie E. Hoyt for taxes of 1893, which was before there was any deed to Pomeroy; and to that part of the so-called Pomeroy land claimed by the plaintiffs neither Hoyt nor Irwin ever had any color of title. The Pomeroy deed was not filed in the case nor mentioned in the proceedings nor referred to in the commissioner's deed.

For the purpose of showing the location of the DeWit Clinton 142,000 acre grant (R-222), it was further shown by the witness Sell that Peter Huff creek formed the southern boundary of that tract, and that all the land in

controversy lies on the northern side of that creek and within the said DeWit Clinton survey, and, consequently, if the deed from Wilkinson to Stoddard and Hall could be so located as to embrace the land in controversy within its boundaries, this land was *excepted* therefrom and *from the sale therein made*, and did not pass to plaintiff and the plaintiff had no title thereto.

Irwin had conveyed to C. F. Thomas one-half interest in the land conveyed to him by McClure, commissioner, prior to any other conveyance by Irwin (R-261-265), and for the purpose of showing that if the plaintiff had any title, which was denied, it was only an undivided half, the other half being held in part by defendant Baer, as tenant in common with plaintiff, the rest of the title being outstanding, defendants offer in evidence the deeds from Irwin to Thomas and Thomas to Baer and Ellison.

At the conclusion of the evidence, the court on motion of the plaintiff, directed a verdict in its behalf (R-268), except as to the inclosed land of James Dolliver Brown, and entered judgment accordingly, and overruled defendants' motion set aside the said verdict and for a new trial (R-24).

ARGUMENT.

From the foregoing statement, as well as from the statement and argument of counsel for the defendant in error, it is probably manifest that an examination of the record of this case is necessary to a determination of the questions presented by the motion; and where a motion to dismiss for want of jurisdiction or to affirm cannot be determined without looking into the merits, it will be continued to the final hearing.

Hecker vs. Fowler, 1 Black, 95;

Semple vs. Hager, 4 Wall, 431;

Lynch vs. De Bernal, 131 U. S., 94.

And where the record suggests many points which cannot be considered upon the motion, the court will refuse the motion but allow it to be brought up upon the argument on the merits.

Day vs. Washburn, 23 How. 309.

The motion is at least premature. It is also untenable.

Counsel for defendant in error misapprehend the constitutional question raised here and in the court below. They say that "so far as any constitutional question could possibly be involved in this suit, it must of necessity relate to the system established by the constitution and statutes of West Virginia forfeiting land," etc., and say that this question has been decided in *King vs. Mullens*, 171 U. S., 404; *King vs. Panther Lumber Co.* 171, U. S., 437; *King vs. State of W. Va.* 216, U. S. 92, and other cases cited. It is probably because of the supposed de-

cision in these cases of the only constitutional question herein presented, that the question is declared too frivolous to require argument.

The cases referred to deal *exclusively* with the contention that the constitution and statutes of West Virginia forfeiting land and transferring the title, *proprio vigore*, to the State or to some private adverse claimant contravene the Constitution of the United States—they did not in any manner decide, involve or discuss the question here presented; and the questions here presented do not concern the validity of any provision of the State constitution or statutes, but the objections raised to the admission of the records of the chancery causes herein before referred to, and by the 2nd, 4th, 5th and 10th assignments of error (R-270-276, 277-284, 285-293 and 296), contend that the giving of effect to decrees and proceedings against persons not parties thereto or privies therewith, as a basis for a judgment ousting them from the possession of land occupied by them, as if they were parties to said decrees, is not due process of law, and in the present case violates both the 5th and 14th Amendments.

It is not easy to understand how the learned counsel could at this time mistake the position of the plaintiff in error, or suppose that *King vs. Mullens* and the other cases referred to, or any case cited by the counsel has the remotest bearing upon this cause or the motion under consideration.

Jurisdiction in this case is based upon the principle contained in *Fayerweather vs. Rich*, 195 U. S., 276.

The syllabus is as follows:

"Where the appellant's contention is that the Circuit Court, by giving unwarranted effect to a judgment of a

state court and accepting that judgment, which contained no finding of one of the fundamental facts as a conclusive determination of fact, deprived him of his property without due process of law, and that contention is made in good faith, and under the circumstances, upon reasonable grounds, the application of the Constitution is involved and this court has jurisdiction of a direct appeal from the Circuit Court."

At page 298, after discussing *C. B. & R. R. Co. vs. Chicago*, 166 U. S., 226, Mr. Justice Brewer, delivering the opinion of the court says:

"If a judgment of a state court can be reviewed on error upon the ground that, although the forms of law were observed, it necessarily operated to wrongfully deprive a party of his property (as indicated by the decision just referred to), a judgment of the circuit court of the United States, claimed to give such unwarranted effect to a decision of a state court as to accomplish the same result, may be considered as presenting the question how far it can be sustained in view of the prohibitory language of the Fifth Amendment, and thus involve the application of the Constitution."

In the present case it is claimed as strenuously as possible, that the District Court did "give unwarranted effect to a decision of a state court," which effect was to deprive the defendants of property without due process of law, because they had had no opportunity, in the causes invoked against them, to resist any of the claims or contentions of any party to these suits, and were denied, in the pending case, the right to overcome the supposed adjudication by other evidence and have the finding of the jury upon all the evidence.

The evidence brought out upon the trial, aside from the supposed adjudication in *State vs. King* and *State vs.*

McClintock, showed conclusively that the plaintiff had no title, because the 480,000 acre grant, the deed from McClure to Irwin, and the deed from Wilkinson to Stoddard and Hall, all following the same bounds, abutments, corner trees, and natural objects, did not include the land claimed by the plaintiff, and the last deed excluded it, and neither of the cases referred to conferred any title whatever upon the plaintiff. If the other evidence had not been destructive of plaintiff's claim, it would not have been necessary to rely upon supposed adjudications. Upon that other evidence and upon all the evidence the court would have been warranted in directing a verdict for the defendants, and should at least have submitted to the jury the question of the identity of the land sued for with that of the title papers in the case, and the question of the location and boundaries of such land. All the other evidence was totally disregarded by the court and controlling effect given to the decrees of dismissal referred to—and this notwithstanding there is not one syllable of evidence of any kind in this record by which it is possible to determine what particular thing was adjudicated in either of said cases, even as for or against any of the parties thereto, so far as relates to the land in controversy. The court was governed, in its decision, by the opinion of the Supreme Court of West Virginia upon appeal in *State vs. King*, although that opinion was not offered in evidence, as will plainly appear from the transcript of this case. It is impossible to reconcile the decision of the state court with the evidence then before it and the law applicable to it, but that was a chancery cause and decision upon all the evidence was within the province of the court, as in this case it was in the province of the jury.

The decision in this case rests entirely upon the supposed binding force of decrees to which the defendants, who are put out of possession by their supposed virtue, had no privity whatever.

Counsel for defendant in error say that the plaintiffs in error were not deprived of any property because they had no property, having, as they say, no title. That, if sufficient, would be an easy answer to every such complaint. But upon a question of jurisdiction, the court is not greatly concerned whether the complaining party has actually been deprived of property, or had any of which to be deprived—that is a question that concerns the merits and not the jurisdiction.

In the Fayerweather case this court says:

“Whether the contention of the plaintiff in respect to the character of the state proceedings can be sustained or not is a question upon the merits and does not determine the nature of jurisdiction. That depends upon whether there is presented a *bona fide* and reasonable question of the wrongful character of proceedings in the state court and the necessary result therefrom.”

In Penn. Mut. Life Ins. Co. vs. Austin, 168 U. S., 685-695, a case in which it was urged that the court was without jurisdiction because a state statute, changed to contravene the Constitution of the United States, did not in fact do so, this court said:

“Of course, the claim made must be real and colorable, not fictitious and fraudulent. The contention here made, however, is, not that the bill, without color or right, alleges that the state law and city ordinances violate the Constitution of the United States, but that such claim as alleged in the bill is legally unsound. The argument, then, in effect, is that the right to a direct appeal to this

court does not exist where it is claimed that a state law violates the Constitution of the United States unless the claim is well founded. But it cannot be decided whether the claim is meritorious and should be maintained without taking jurisdiction of the case."

In that case it was found to be unnecessary to decide whether the statute conflicted with the Constitution or not, but the claim of such conflict, being made in good faith was sufficient to confer jurisdiction. In the Fayerweather case the court sustained the jurisdiction and overruled the motion to dismiss, but upon consideration of the merits found that the claim of deprivation of property without due process was unfounded. That was a case, however, between the very parties to the original decree and not, like the present case, one where the decree is given as great effect against strangers as it could possibly have against parties to the decree.

In West Virginia, as elsewhere, the plaintiff in ejectment must recover upon his own title, and not upon the want or weakness of his adversary's title, and the plaintiff's title must be a legal title. The defendant is not required to give up possession to any one but the holder of such legal title. In the case at bar, the defendants, according to the allegations of the declaration and as a matter of fact shown by the evidence, were in the actual possession of the demanded premises. That possession is itself a thing of value—property—and is evidence of title.

In *Wilson vs. Phoenix Powder Mfg. Co.*, 40 W. Va. 413, it is held:

"Actual possession, being an element of complete legal title to real estate, is *prima facie* evidence of such title in the possessor. One in such possession may maintain trespass or trespass on the case for damages thereto, without further proof of his title."

The plaintiffs in error have certainly been deprived of their property, and that has been done by the court below in sole reliance upon the efficiency of decrees in causes to which the defendants were not parties and were not summoned to make defence, and from which they had no power of appeal or direct review in any manner whatever. By no possibility could the decision of this case have been such as it was, if it had been submitted to a jury for determination upon the merits and upon all the evidence, competent and incompetent.

DUE PROCESS OF LAW REQUIRES NOTICE AND OPPORTUNITY TO BE HEARD.

Hovey vs. Elliott, 167 U. S. 408-417:

"Can it be doubted that due process of law signifies a right to be heard in one's own defence? If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of the Constitution? If this be true, as undoubtedly it is, how can it be said that the judicial department, the source and foundation of justice itself, has yet the authority to render lawful that which if done under express legislative sanction would be violative of the Constitution?"

King Tonopah Mfg. Co. vs. Lynch, 232 Federal, 485-494, citing above case, says:

"We have no precise definition for due process of law. Its fundamental requisites, however, are notice and the opportunity to defend."

Twining vs. N. J., 211 U. S., 78-110:

"There shall be notice and opportunity for hearing given the parties."

The same principle runs through a multitude of decisions of this court, early and late, so numerous that citations are needless and would be burdensome. The principle is supposed to govern all courts of justice, but unfortunately sometimes, as in the present case in the court below, it is not applied or given due effect.

Irrespective of what may ultimately be the decision of this court upon the question of the admissibility of the evidence complained of or of the effect to which, if admissible, it is entitled, it is respectfully urged and submitted that a consideration of that question involves the construction or application of the Constitution of the United States and confers upon this court jurisdiction herein, and that the contention raised by the objections and assignments of error referred to are not frivolous, light or trivial, but are as grave and serious as any which this court is often called upon to consider. If this is so, and the court has jurisdiction, it is unnecessary at this time to advert further to the merits of this question or of the many others presented by the record; if this court has no jurisdiction, discussion of the merits is idle. We therefore resist the temptation to correct errors of statement, and refute the arguments of counsel for the defendant in error relating to the merits and reserve that for the hearing and argument upon the merits.

Respectfully,

MAYNARD F. STILES,

For Plaintiff in Error.

JONES ET AL. *v.* BUFFALO CREEK COAL & COKE
COMPANY.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF WEST VIRGINIA.

No. 293. Argued November 5, 1917.—Decided December 10, 1917.

Error committed by the District Court in admitting former judgments in evidence and in rendering judgment on such evidence against a party who objects that they do not bind him but who is fully heard does not constitute a denial of due process of law.

Writ of error dismissed.

THE case is stated in the opinion.

Mr. Maynard F. Stiles for plaintiffs in error.

Mr. William R. Lilly and *Mr. Robert C. Alston*, with whom *Mr. Philip H. Alston*, *Mr. C. W. Campbell*, *Mr. Douglas W. Brown*, *Mr. Cary N. Davis* and *Mr. R. L. Shrewsbury* were on the briefs, for defendant in error.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

This is an action of ejectment brought by the Buffalo Creek Coal & Coke Company in the District Court of the United States for the Southern District of West Virginia. Jurisdiction of that court was invoked solely on the ground of diversity of citizenship. A verdict was directed for the plaintiff below; and the case was brought here by direct writ of error, defendant below claiming that, by the action of the lower court, they have been deprived of their property without due process of law in violation of the Fifth and Fourteenth Amendments of the Federal Constitution.

Plaintiff below set up title from the State derived through mesne conveyances, by virtue of sales made for the benefit of the school fund under statutes which have repeatedly been held valid by this court.¹ The action of which defendants complain as depriving them of due process of law, is the admission in evidence herein of the records and papers in three proceedings brought in the state courts of West Virginia under these statutes, and the rendering of judgment herein against them. As the action now complained of is not the action of a State, the Fourteenth Amendment can have no application. And the claim that the action of the court violates the Fifth Amendment is likewise unfounded.

It was the contention of the plaintiff below that the records and papers in the three suits established title in those under whom it claims; and also that the decrees in those suits created *res judicata* as against the defendant, because their predecessors in title had been parties or privies to those suits. The defendants below contended, among other things, that the premises in question were not within the tracts affected by one or more of the decrees in those suits and that they were not bound by any of them. It is conceivable that the defendants below were right in whole or in part, and that the trial judge erred in admitting some or all of the evidence objected to and in rendering judgment for the plaintiff. But error of a trial judge in admitting evidence or entering judgment after full hearing does not constitute a denial of due process of law. *Central Land Co. v. Laidley*, 159 U. S. 103, 112. The writ of error must be

Dismissed.

¹ *King v. Mullins*, 171 U. S. 404; *King v. Panther Lumber Co.*, 171 U. S. 437; *Swann v. Treasurer of West Virginia*, 188 U. S. 739; *King v. West Virginia*, 216 U. S. 92; *Fay v. Crozer*, 217 U. S. 455; *King v. Buskirk*, 231 U. S. 735.